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Supreme Court, U.S.
FILED

95-705 OCT 30 1995

OFFICE OF THE CLERK

Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER REVIEW SHOULD BE GRANTED TO ARTICULATE A HARMLESS ERROR STANDARD IN HABEAS CORPUS WHERE THE GRAVE DOUBT STANDARD IN O'NEAL v. McANINCH, 115 S.Ct. 992 (1995), HAS BEEN INTERPRETED BY THE FEDERAL COURT AS ANY DOUBT CONTRARY TO KOTTEAKOS v. UNITED STATES, 328 U.S. 750 (1946), AND BRECHT v. ABRAHAMSON, 507 U.S. ___, 123 L.Ed.2d 353, 113 S.Ct. 1710 (1993), ESPECIALLY WHERE THE STATE COURTS DETERMINED, PURSUANT TO CHAPMAN v. CALIFORNIA, 386 U.S. 18 (1967), THAT ANY CONSTITUTIONAL ERROR WAS HARMLESS.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 61 F.3d 815 (11th Cir. 1995), and is reproduced in the appendix to this pleading.[1] [A1-A11].

The decision of the United States District Court, Northern District of Florida, entered on June 10, 1995, is not reported, but is reproduced in the appendix to this pleading. [A12-A19].

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[1] [A-] represents a citation to the materials contained in the appendix to this pleading.

The opinion of the United States Court of Appeals for the Eleventh Circuit if reported at 970 F.2d 766 (11th Cir. 1992), and is reproduced in the appendix to this pleading. [A20-A22].

The decision of the United States District Court for the Northern District of Florida is reported at 758 F.Supp. 688 (N.D. Fla. 1990), and is likewise reproduced in the appendix to this pleading. [A23-A48].

The decision of the Florida Supreme Court, which denied relief as to the claim now at issue, is reported at 556 So.2d 1096 (Fla. 1990), and is also set forth in the appendix to this pleading. [A49-A53].

The decision of the Eleventh Circuit Court of Appeals is reported at 840 F.2d 787 (11th Cir. 1988), and is reproduced in the appendix to this pleading. [A54-A79].

The decision of the United States District Court, Northern District of Florida, entered on March 23, 1985, is not reported, and is reproduced in the appendix to this pleading. [A80-A100].

The decision of the Florida Supreme Court is reported at 457 So.2d 1380 (Fla. 1984), and reproduced in the appendix to this pleading. [A101-A112].

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was rendered August 1, 1995. No petition for rehearing and suggestion for rehearing en banc was filed due to the summary nature of the order entered by a panel of the Eleventh Circuit. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner would contend that the following amendments to the Constitution of the United States are involved:

Amendment XIV, which provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States: nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII, which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment X, which provides that:

> Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

A. History

On December 12, 1978, Frank Smith and two codefendants, robbed, kidnapped, raped and murdered Sheila Porter. The facts of the crime are adequately set out in Smith v. State, 424 So.2d 726 (Fla.), cert. denied, 462 U.S. 1145 (1983), and Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988).

Smith was tried and convicted on all four counts and was subsequently sentenced to death in keeping with the recommendation of the advisory jury. Six statutory aggravating factors were found by the trial court: (1) that the defendant had prior convictions for violent felonies, robbery; (2) that this murder was committed in the course of an enumerated felony, kidnapping; (3) that the murder was committed to avoid arrest; (4) that this murder was committed for pecuniary gain; (5) that the murder was heinous, atrocious and cruel, and (6) that the murder was cold, calculated and premeditated without moral or legal justification. One statutory mitigating factor was found, Smith's age of nineteen at the time of the crime.

On appeal Smith raised a number of issues, none of which asserted Lockett v. Ohio, 438 U.S. 586 (1978), error. The Florida Supreme Court affirmed Smith's conviction and sentence of death, Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 464 U.S. 1145 (1983).

In 1984, Smith filed his initial collateral pleadings in the state trial court arguing ten claims, one of which specifically asserted that "the instructions as to mitigation were restricted (Eddings v. Oklahoma; Lockett v. Ohio)." Relief was denied following an evidentiary hearing (on the effectiveness of counsel claim, including why defense counsel elected not to present non-statutory mitigating evidence). Smith appealed and the Florida Supreme Court found all the issues procedurally barred (including the Lockett v. Ohio claim), and rejected, on the merits, any assertion that trial counsel rendered ineffective assistance, including finding trial strategy with regard to the "limitation" of non-statutory mitigation presented. Smith v. State, 457 So.2d 1380 (Fla. 1984).

In federal court, pursuant to 28 U.S.C. §2254, Smith raised both Lockett error and "Hitchcock-like" error in 1984. The federal court denied all relief without further evidentiary hearing. On appeal, Smith raised six issues to the Eleventh Circuit, one of which challenged only the unreliable nature of the sentencing procedure.

Relief was denied. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988).

Smith filed his rehearing, raising Hitchcock v. Dugger, 481 U.S. 393 (1987), error. Although Smith raised a "Hitchcock-type" claim prior to this, Hitchcock was decided after the federal district court's decision and while Smith's case was pending on appeal. Rehearing was denied without prejudice to Smith to present his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989), cert. denied, 493 U.S. 1064 (1990).

Smith filed a second motion for post-conviction relief in the state trial court raising the Hitchcock error. The trial court, in 1990, denied Smith's successive motion, finding all claims procedurally barred except the Hitchcock claim. The trial court found a Hitchcock violation, however it held the error to be harmless beyond a reasonable doubt. Likewise, on appeal, the Florida Supreme Court denied all relief, Smith v. State, 556 So.2d 1096 (Fla. 1990), finding that all claims but the Hitchcock claim were procedurally barred. As to the Hitchcock claim, the court concluded the error was harmless beyond a reasonable doubt pursuant to Chapman v. California, 386 U.S. 18 (1967).

In Smith's successive federal habeas corpus petition the district court granted relief as to the Hitchcock error, Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990).

The Eleventh Circuit concurred, concluding "This Court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)." In a brief opinion the Court also observed the record "well supports the district court's findings of fact. . . ." Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992).

Certiorari review was filed and in Smith v. Singletary, 113 S.Ct. 1940 (1993), certiorari was summarily granted, the opinion was vacated, and the case was remanded to the Eleventh Circuit in light of Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

On remand, Smith successfully argued to the Eleventh Circuit that the cause should be remanded to the district court for further consideration to access the Hitchcock error under Brecht. The district court, without further review of the record, again concluded harmful Hitchcock error.

On August 1, 1995, the Eleventh Circuit concurred. Following a discussion of the appropriate analysis Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), and Kotteakos v. United States, 328 U.S. 750 (1946), the Eleventh Circuit countenanced the inclusion of "improper" mitigating evidence that was presented as well as the "preclusion" of other potential mitigating evidence and held that under O'Neal v. McAninch, 115 S.Ct. 992 (1995):

> Given the district court's factual determinations concerning the wealth of mitigating evidence that was both presented and precluded, we can only conclude that the Hitchcock error in this case had a substantial effect on the outcome of Smith's sentence.

61 F.3d at 819.

B. Facts

The same jury instruction rejected in Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987), was read to the jury. In Smith's successive collateral attack raising a Hitchcock claim, he argued the trial judge and the capital sentencing jury was led to believe they could not consider nonstatutory mitigating circumstances in reaching their respective judgments, as to the appropriate sentence to be imposed. Moreover, armed with a recently acquired affidavit from trial counsel (stating that he felt restricted by the state of the law), Smith argued that the sentencing jury and the trial court were not provided with other evidence of mitigation that they could have considered. The state trial court, in its order denying relief January 30, 1990, found Smith's Hitchcock claim properly before the court, but concluded that the error was harmless beyond a reasonable doubt.

In 1984, Smith argued that defense counsel, Phil Padovano, rendered ineffective assistance of counsel for

failing to develop mitigating evidence. Specifically, in Claim VIII of Smith's first Rule 3.850 motion (now known to be the Hitchcock issue).

In the original 3.850 motion, Smith also presented summaries of potential witnesses who could have been called by defense counsel to present nonstatutory mitigating evidence. At that point, Smith was challenging the effectiveness of defense counsel's representation with regard to the penalty phase.

At the evidentiary hearing held October 9, 1984, defense counsel took the stand as a court witness and testified with regard to his strategy and handling of both the guilt and penalty phases of Smith's trial. When asked whether he felt restricted with regard to the presentation of nonstatutory mitigating evidence:

> Because at the time, we were operating under a court decision in Florida which said that you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them.
>
> Since then the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really say anyway. But at the time I was following the law that was existent then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law, you can't do it.

(Evidentiary hearing held October 9, 1984, pages 83-84).

Albeit defense counsel was able to recall his strategy and tactics for calling "or not" calling certain witnesses, the record bares out that his memory in 1984 was flawed as to what he actually knew or did at Smith's trial in 1979. The 1979 trial record reflects defense counsel understood and did "not feel limited" by what nonstatutory mitigating evidence he may present. He informed the trial judge of the recent decision in Songer v. State, 365 So.2d 696 (Fla. 1978) (mitigating evidence is not limited to statutory mitigation), in a pretrial motion.

On January 31, 1979, approximately seven (7) months prior to trial, defense counsel filed a motion to dismiss asserting that pursuant to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the "failure to allow the presentation of nonstatutory mitigating evidence renders the death penalty unconstitutional." (R 44). During the course of the hearing held on the motions on February 21, 1979, approximately six (6) months prior to trial, defense counsel presented an argument acknowledging the existence of Songer v. State, supra, and asserted that Florida's death penalty statute was unconstitutional because it restricted the consideration of nonstatutory mitigating evidence notwithstanding Songer:

> Unfortunately for my argument, Your Honor, I will tell you this in all candor, the Florida Supreme Court ruled about two weeks ago in the case of Sanger v. State, [sic] that they really didn't say what they previously stated in State v. Cooper, and that the Florida Statute doesn't preclude consideration of non-statutory mitigating circumstances. So again I would submit that argument. I want to let you know that it is but, I also want to let you know in all candor that several weeks ago the Supreme Court ruled against our position on that argument.

(Original trial record, pages 137-138).

Three months prior to trial, the Florida Legislature passed §79-353, modifying §921.141, to read in material part:

> . . . In the proceedings, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant, and shall include matters relating to any of the aggravating and mitigating circumstances enumerated in §§(5) & (6). . . .

At the 1984 evidentiary hearing, defense counsel testified that he had a strategy at trial and he believed this strategy was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, he

asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavour after the underlying felonies were committed. His strategy was solidified when, during the jury's penalty phase deliberations, they returned and asked the question as to whether Smith had to personally pull the trigger.

Defense counsel secured the services of Dr. Wallace Kennedy, a psychologist who examined Smith and reported Smith was a "secondary psychopath." Defense counsel thought about using Kennedy but after the explanation in Kennedy's report, believed Kennedy would be more harmful than good as a witness. (Evidentiary hearing held October 9, 1984, pages 45-46, 102). With regard to calling other witnesses on behalf of Frank Smith, defense counsel indicated he talked with other family members and did not feel that Smith's background, which was deprived and poor, would have mattered based on his strategy to go for a withdrawal defense at the penalty phase. (Evidentiary hearing held October 9, 1984, pages 44, 62, 64, 78, 95, 98, 103). He stated that the jury's question influenced his decision whether to call witnesses at the penalty phase and that, "if he thought it would have been helpful he would have done it." (Evidentiary hearing held October 9, 1984, page 65).

In 1990, when the district court reviewed Smith's Hitchcock analysis, it observed:

> As Petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a 'cooperating' accomplice, Victor Hall, was expectant to receive a life sentence with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

The Court not only considered what the aforenoted quote demonstrated was known and presented at trial, but also pointed to "substantial non-record, nonstatutory mitigating evidence which would have been presented had the teachings of 'Hitchcock been available at the time of Smith's trial.'"[2] The Court observed:

> For example, Petitioner has filed affidavits, letters and reports

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[2] This nonstatutory evidence was the identical evidence submitted by the defense previously to argue defense counsel's strategy at the penalty phase was ineffective. The district court and the Eleventh Circuit found counsel did not render ineffective assistance of counsel.

which indicate, inter alia, that defendant: (1) had a long-term history of alcohol and substance abuse; (2) suffered from Grand-Mal epilepsy; (3) was, for all practical purposes, abandoned by his mother and abused by his grandmother; (4) had a history of child deprivation indicating malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication of his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institute when he was convicted of robbery at age fifteen; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some non-statutory mitigating evidence was both presented and argued to the jury, the State neither addresses this alleged record mitigating evidence nor explains why this Court might find such evidence to be insubstantial or incredible. As to the proffered 'non-record' non-statutory mitigating evidence, the State neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

On remand from the Eleventh Circuit, the federal district court recited Kotteakos v. United States, 328 U.S. 750 (1946), and Brecht, supra, as the "standard" applicable, but the court gave no further consideration of the record as a whole. Rather, the court summarily articulated the issue and then readopted its early 1990 opinion.

Likewise, the Eleventh Circuit, without even acknowledging its previous determination that trial counsel's effectiveness was not wanting for failing to argue this additional non-statutory mitigation, affirmed.

REASONS FOR GRANTING THE WRIT

REVIEW SHOULD BE GRANTED TO ARTICULATE A HARMLESS ERROR STANDARD IN HABEAS CORPUS

In Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353, 363, 113 S.Ct. 1710 (1993), the United States Supreme Court, speaking through Chief Justice Rehnquist, held that the Chapman harmless error standard was not the appropriate standard for federal habeas corpus review. The Court, in Brecht, in further discussing the significant change in reviewing errors on collateral review, held:

> . . . The Kotteakos standard, we believe, fills the bill. The test under Kotteakos is whether the error 'had substantial and injurious effect or influence in

> determining the jury's verdict.' (cite omitted). **Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it results in 'actual prejudice.'** (cite omitted). The Kotteakos standard is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases. Moreover, because the Kotteakos standard is grounded in the federal habeas error rule (28 U.S.C. §2111 [28 U.S.C. §2111]), federal courts may turn to an existing body of caselaw in applying it. Therefore, contrary to the assertions of Petitioner, application of the Kotteakos standard on collateral review is unlikely to confuse matters for habeas courts.

123 L.Ed.2d at 372-373 (emphasis added).

Since Brecht and O'Neal v. McAninch, 115 S.Ct. 992 (1995), relatively few courts have undertaken the Kotteakos/Brecht/O'Neal analysis.

In O'Neal, supra, the Court assumed that it would be a rare occasion when a court would have grave doubts with regard to whether an error was harmless. The Court held is essence that a tie would go to the party claiming harm. "We conclude that the uncertain judge

should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict.'").

As a result, what now takes place at the federal habeas corpus level is a review of a state court judgment with the view that constitutional error (unless so de minimus) raises grave doubt resulting in substantial and injurious error. In essence, there is either no error, de minimus error or harmful error requiring reversal.

The instant case demonstrates this specifically. In reviewing Smith's Hitchcock claim the state trial and appellate courts applying a Chapman standard had no difficulty in ascertaining harmlessness sub judice. In articulating all the pertinent facts, those courts concluded that any constitutional error in the instruction could not have impacted jury or judge in assessing the appropriate sentence. In comparison the federal district court and the appellate court struggled mightily, to conclude ". . . under the instruction given by the trial court, nonstatutory mitigating evidence could not be weighed by the jurors as they considered Smith's fate, whether or not counsel introduced, or the jury heard, such evidence. The erroneous instruction thus infected the sentencing process by placing a thumb on death's side of the scale." In other words a Hitchcock instructional error was harmful-period. Such a result is wrong.

See: Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994), and Horsley v. Alabama, 45 F.3d 1486 (11th Cir. 1995).

Hitchcock itself recognizes an instructional error can be harmless, and the state courts so found. See: Wood v. Bartholomew, Case No. 94-1419, decided October 10, 1995, wherein this court recognized in a Brady v. Maryland, 373 U.S. 83 (1963), context a similar mistrust of the state court's interpretations of federal constitutional law.

The analysis of a "Hitchcock error" in Horsley v. Alabama, supra, 45 F.3d at 1492-1493, is the analysis that should be embraced by this Court. There the appellate panel assumed a Lockett v. Hitchcock, supra, error, a "trial error" governed by Brecht and held:

> The mitigating circumstances before the sentencing court which, according to Horsley, were not considered include: the absence of earlier criminal activity (*other than the conviction for armed robbery in which a police officer was shot* which comprised the second aggravating factor); a childhood head injury which left Horsley suffering from headaches and spasms and made him easier to dominate; and the fact that Horsley grew up without a father. But we are struck by the full force of the savage facts of this crime. We remember also the imbalance between aggravating and mitigating (including non-statutory factor) circumstances

> marked by Alabama's appellate courts (which we see as persuasive, as a factual matter, in our weighing of injurious effect on the sentencer - although in no way controlling, a la Clemons). And, after making our own examination, of the record anew, we conclude independently that any error was harmless under the Brecht standard.

Given the Brecht standard and the nature of the facts regarding Hitchcock error, the district court initial analysis is flawed. As such, any reliance on said determination seriously brings into question the failure of the Eleventh Circuit to review the facts anew to ensure the correctness of those findings. See Parker v. Dugger, 498 U.S. 308 (1991).

In Smith, the district court, in its 1990 order, presumed prejudice, ". . . unless and until the State proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation." The Court went on to observe:

> The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this Court, the State of Florida is required to do more than point this Court to the enormity of the crime in order to defeat Petitioner's claim for relief. . . .

To the contrary, the state court record reflects that (1) there was no significant nonstatutory mitigation which was presented in 1978 that would outweigh the six unassailed aggravating circumstances found to exist; (2) with the exception of the instruction given at trial, no evidence exists on this record to show that defense counsel, the trial judge or for that matter, the jury believed there were limitations to the mitigation which if not limited would have changed the results; and (3) in light of the state of the law, what defense knew and the investigation defense counsel performed in attempting to secure non-statutory mitigation "actual prejudice" could not have resulted. See Bolender v. Singletary, 16 F.3d at 1562-1565 (albeit jury recommended life, court found no Hitchcock error).

The Eleventh Circuit in Bolender, supra, found no merit to Bolender's claim his trial counsel felt restrained because the trial court denied pretrial motions. The assault against defense counsel's effectiveness was found to be wanting because:

> At the state evidentiary hearing on the ineffective assistance issue, trial counsel testified that he had investigated nonstatutory mitigating evidence involving Bolender's background, but that he made a strategic decision not to present such testimony after observing the jurors and concluding that a quick

> recommendation of life from the jury would be more influential on the sentencing judge.

16 F.3d at 1565.

Presumably, the Eleventh Circuit rejected the reasoning of Bolender in Smith because the district court in Bolender denied relief, while the district court in Smith granted habeas relief on the same facts.

In Smith, the district court did not even attempt to address any of the above. Rather, after reciting a cursory account of the facts of the case, the district court concluded:

> The erroneous instruction thus infected the sentencing process by placing a thumb on death's side of the scale. Under such circumstances, this court cannot say, with fair assurance, that the error did not have a substantial and injurious effect upon the jury's decision to recommend the death penalty.

Such a result flies in the face of the plain language of Brecht, which requires harmless error analysis of the entire or whole record not a "jaundiced" view of the record totally colored by Smith's claim. For example, the district court had no difficulty identifying those "substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced for the jury's consideration." (Order dated

June 10, 1994, page 6). Unfortunately, "this evidence" referred to was not introduced at the sentencing because defense counsel made strategic choices not to do so as borne out by the total record. The district court acknowledged that some nonstatutory mitigation was introduced but opined that was trial counsel's attempt "to stretch the statutory mitigating factors to encompass what were, in essence, nonstatutory factors." (Order dated June 10, 1994, page 6).

In applying a harmless error analysis consistent with Brecht, federal courts nationwide have engaged in a full review of the facts in a given case without difficulty. In Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994), that court assessed the impact a "suspect" heinous, atrocious and cruel instruction had on the imposition of the death penalty by the jury. The court noted from Brecht:

> . . . Before overturning final and presumptively correct state convictions or sentences on habeas review, federal courts must assess for harmlessness those errors that are eligible for this review in order to assure that the extraordinary relief provided by the writ is granted only to those 'persons whom society has grievously wronged.'. . .

Smith v. Dixon, 14 F.3d at 976.

See also: Kontakis v. Beyer, 19 F.3d 110 (3rd Cir. 1994); Madden v. Collins, 18 F.3d 304 (5th Cir. 1994) (court

concluded that prosecutor's impermissible comment on the defendant's failure to testify in this capital murder case was harmless); Robinson v. Arvonio, 27 F.3d 877 (3rd Cir. 1994) (state's use of perjured testimony could result in harmless error); Libby v. Duval, 19 F.3d 733 (1st Cir. 1994) (Sandstrom v. Montana, 442 U.S. 510 (1979) error must be viewed in light of entire record); Anderson v. Butler, 23 F.3d 593 (1st Cir. 1994) (Sandstrom error - viewed under "whole record" test per Brecht); Hardnett v. Marshall, 25 F.3d 875 (9th Cir. 1994) (blatant Bruton error harmless - no actual prejudice based on review of entire record); Latrine v. Mann, 25 F.3d 1162 (2nd Cir. 1994) (Bruton violation). The Court observed:

> . . . As it is virtually impossible to determine whether a jury did or did not ignore an inculpatory statement, the determination of whether an error is harmless, depends upon a host of other factors, all readily accessible to reviewing courts. . . . These include the importance of the witness' testimony in the prosecution's case, the presence of absence of evidence corroborating or contradicting the testimony and the overall strength of the prosecution's case. (case omitted). The strength of the prosecution's case is probably the single most critical factor in determining whether error was harmless.

Latrine v. Mann, supra, 25 F.3d at 1167-1168.

Based on the Smith "total record" - the Hitchcock error did not result in actual prejudice. Trial strategy of defense counsel overwhelmingly played the key role in what went before the jury at the time of the penalty phase. The collected "nonstatutory mitigation" garnered by post-trial counsel should not and must not play any part in assessing whether **had the jury been properly instructed**, a life recommendation would have resulted. This is so because defense counsel made a calculated decision as to how to present his case. Moreover, there is no suggestion that defense counsel operated from ignorance of the possible mitigation that has been identified. His choices were made on strategy as opposed to lack of knowledge. Actual prejudice must be shown in light of what was presented[3]; the circumstances at

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[3] The record reflects that defense counsel argued to the jury in the penalty phase that the defendant did not personally kill Sheila Porter; that the defendant was fifteen years old when he committed his prior robberies; that he was only nineteen years old when the instant crime was committed; that he had been drinking and smoking pot at the time which impaired his ability to conform his conduct to the requirements of law; that although Frank Smith committed the robbery and kidnapping and rape, he was a minor participant in the murder.

the time of sentencing[4] and the state of the law[5] at the time of Smith's trial.

At closing, defense counsel argued in part:

> But there was some testimony, and its conflicted, that they had quite a bit to drink the night that this occurred; some testimony concerning some smoking of marijuana. Now, I don't know to what extent you consider that. Probably in -- probably with regard to the substantive defense you didn't consider it at all.
>
> But it may have a bearing on the question of ultimate responsibility. A person who is a cold blooded murderer, who does that for deliberate gain, the hit man who gets paid to kill somebody, is certainly not -- when you're talking about the death penalty, its certainly not in the same class as a delinquent youth

---

[4] Six statutory aggravating factors were found to exist and one statutory mitigating factor, that Smith was nineteen years old at the time of the crime.

[5] No restrictions existed at the time prior to Smith's trial because §79-353, modifying §921.141, Fla.Stat., was the current state of the law - no restrictions regarding mitigation - statutory and non-statutory.

> who gets drunk and robs a store. I'm not saying that's right.
>
> But what I am saying is that when you're talking about the death penalty, you can't classify those people the same way. So what we have are the application of at least one known aggravating factor. But I submit to you the mitigating factors, applied to this case, far outweigh the aggravating factors, both numerically and both from the standpoint of the qualitative application of those factors.

(Trial Transcript, pages 2760-2761).

Given the nature of the closing arguments presented, defense counsel intended those jurors to consider the minuteness of the evidence in relationship to those mitigating factors. He was desirous that the judge and jury find statutory mitigating but he made it perfectly clear that the slightest evidence in "mitigation" be considered. Given the aggravating factors read to the jury and the mitigation tendered, the aggravating factors are important and must be considered regarding the totality of whether the invalid instructions impacted the sentencing jury in 1979. The district court failure to appreciate the "whole record" standard to be applied; failure to view the alleged nonstatutory mitigating evidence before the jury in 1979, and failure to compare "that mitigating evidence" against the unassailed aggravating circumstances

before the jury totally flaws the Eleventh Circuit opinion.

In deciding whether there was a probability that the Hitchcock violation could have impacted the jury's recommended sentence, the inquiry must center on what was presented in 1979, not what collateral counsel "later" asserts could have been presented in 1979 (especially where a tactical decision was made to limit presentation of evidence). This record clearly demonstrates that in 1979, defense counsel knew about Lockett v. Ohio (he filed a pretrial pleading regarding same); argued to the trial jury and court that statutory mitigation existed and if the jury did not consider it as statutory mitigation, consider it for whatever it was worth; investigated the facts and circumstances surrounding Frank Smith's life and ultimately presented no mitigating evidence at the penalty phase (because he relied on the "lingering doubt" the jury seemed to possess that they would not return death against Smith because he might not be the triggerman.

Defense counsel testified at the 1984 evidentiary hearing that he had a strategy at trial that he believed was valid at the penalty phase and likely to result in a life recommendation. Throughout trial, he had asserted Smith did not kill Sheila Porter. He argued Smith withdrew from any criminal endeavor after the underlying felonies were committed. His strategy was solidified when, before the jury rendered its verdict as to guilt, they

returned and asked the question, whether Smith had to personally pull the trigger.

Defense counsel argued to the jury that factors discerned at trial were of a nonstatutory mitigating nature. That mitigation was rejected by the jury and rejected by the trial judge. It cannot be described as substantial in light of the totality of this record. As to the proffered non-record nonstatutory mitigating evidence that came forth in 1984 and in 1990, it is not susceptible to scrutiny or discussion because it had no impact (it was never presented to jury or judge). More importantly, it never would have been presented because defense counsel elected not to do so.[6]

To allow non-record nonstatutory mitigating evidence not presented to the jury and judge to be included in the weighing factor in assessing harmless error, renders any analysis meaningless. Harmless error applies to what is known at the time and whether actual prejudice resulted because of the unconstitutional jury instructions. The district court was absolutely wrong in factoring non-record nonstatutory mitigating evidence not presented to the judge or jury in its creation of the standard to be

---

[6] The very nonstatutory mitigating evidence proffered in 1990, was the nonstatutory mitigating evidence presented in 1984, when defense counsel's representation of Frank Smith was under attack.

applied "based on the teachings of Hitchcock" and then proclaiming that Smith has "now produced" substantial mitigating evidence thus, "the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the State to rebut." Under Brecht, the district court did not modify its analysis of the facts, rather the court merely elevated form over substance and delivered the same harmful error result.

CONCLUSION

WHEREFORE, for the aforementioned reasons Petitioner prays that the petition for writ of certiorari be granted.

Respectfully submitted,

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Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1994

HARRY K. SINGLETARY,

Petitioner,

v.

FRANK ELIJAH SMITH,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEAL FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2772

D.C. Docket No. TCA-90-40035-WS

FRANK ELIJAH SMITH,

Petitioner-Appellee,

versus

HARRY K. SINGLETARY,

Respondent-Appellant.

Appeal from the United States District Court
For the Northern District of Florida

(August 1, 1995)

Before TJOFLAT, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM.

In this capital case, the sentencing court violated Hitchcock v. Dugger, 481 U.S. 393 (1987). This

appeal requires us to determine whether this error was harmless under the standard articulated in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993). We affirm the district court's determination that the error was not harmless under the Brecht standard.

FACTS

On December 12, 1978, appellee, Frank Elijah Smith, and two accomplices, Johnny Copeland and Victor Hall, robbed a convenience store in Wakulla County, Florida. They also abducted the store clerk, took her to a motel, and sexually assaulted her. They then drove the clerk to a wooded area. Smith and Copeland took the clerk in to the woods while Hall waited in the card. While waiting, Hall heard three gunshots. Copeland and Smith then returned to the car without the clerk. Two days later, the clerk's body was found with three bullet wounds in the back of her head.

PROCEDURAL HISTORY

A Florida jury found Smith guilty of first-degree murder and recommended the death penalty. In accordance with the jury's recommendation, the court sentenced Smith to death on the basis of six aggravating factors: (1) that he had two prior convictions for violent felonies; (2) that he committed the murder in the course of a kidnapping; (3) that he committed the murder to avoid arrest; (4) that he committed the murder for pecuniary gain; (5) that the murder was heinous, atrocious, and

cruel; and (6) that the murder was cold, calculated, and premeditated. The court found only one mitigating factor: Smith was nineteen years old when he committed the crime.

Smith's conviction and death sentence were affirmed on direct appeal, and the United States Supreme Court denied his petition for a writ of certiorari. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). Smith then commenced his first habeas corpus petition, which was denied in both state and federal court. Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith, however, filed a petition for rehearing with this court. This court denied Smith's petition without prejudice so that he could present an unexhausted Hitchcock claim to the Florida courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989).

On July 31, 1989, Smith filed a second habeas corpus petition in state court. A Florida trial court found all of Smith's claims to be procedurally barred, with the exception of his Hitchcock claim, which it denied on the merits. On appeal, the Florida Supreme Court held that the sentencing court had committed a Hitchcock error, but that under the standard articulated in Chapman v. California, 386 U.S. 18 (1967), the error was harmless. Smith v. State, 556 So.2d 1096 (Fla. 1990).

Smith then field a petition in the district court. The district court agreed that the sentencing court had committed a Hitchcock error, but disagreed with the Florida Supreme

Court's determination that the error was harmless; instead, the district court granted Smith relief on his Hitchcock claim because it found that the error was not harmless under Chapman. Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990). This court affirmed. Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992).

The state then petitioned for a writ of certiorari. On April 26, 1993, the Supreme Court granted the state's petition and remanded the case for reconsideration in light of Brecht, which it had recently denied. Smith v. Singletary, 113 S.Ct. 1940 (1993). On remand, the district court, applying Brecht, again determined that the Hitchcock error was not harmless. The state now appeals the district court's decision.

ISSUE

The only issue on appeal is whether the sentencing court's Hitchcock error was harmless under the Brecht standard.

DISCUSSION

"[I]n capital cases, 'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence." Hitchcock, 481 U.S. at 394 (quoting Skipper v. South Carolina, 476 U.S. 1, 4 (1986)). The state concedes that the sentencing court committed a Hitchcock error in this case.

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"Harmless error is a mixed question of law and fact subject to de novo review." Bonnor v. Holt, 26 F.3d 1081, 1083 (11th Cir. 1994), cert. denied, 115 S.Ct. 1328 (1995). While this court has plenary review of the ultimate determination of whether an error is harmless, we will only review the findings of fact which underlie that determination for clear error. See Stano v. Butterworth, 51 F.3d 942, 944 (11th Cir. 1995) ("'[U]ltimate' determination of . . . a mixed question of law and fact . . . is subject to de novo review[, but 'w]e will not disregard or overturn findings of fact made by the district court unless they are clearly erroneous.'") (quoting Jurek v. Estelle, 623 F.2d 929, 932 (5th Cir. 1980), cert. denied, 450 U.S. 1001 (1981)); Smith v. White, 815 F.2d 1401, 1407 (11th Cir.) ("[A] federal district court's ultimate legal conclusion . . . is subject to independent review by an appellate court in a habeas action, although subsidiary factual findings by the district court are conclusive unless clearly erroneous."), cert. denied, 484 U.S. 863 (1987).

In determining whether a Hitchcock error is harmless, a habeas corpus court must consider both the mitigating evidence presented at sentencing as well as mitigating evidence that could have been presented, but which "the state trial court prevented the petitioner from presenting." Aldridge v. Dugger, 925 F.2d 1320, 1329 (11th Cir. 1991). In other words, a habeas corpus court must consider all potential mitigating evidence that would have been presented,

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but for the Hitchcock error. See Booker v. Dugger, 922 F.2d 633, 636 (11th Cir.), cert. denied, 502 U.S. 900 (1991). In determining whether potential mitigating evidence would have been presented, a district court will usually have to weigh "post-trial affidavits or testimony of trial counsel and other witnesses and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing." Knight v. Dugger, 863 F.2d 705, 708 (11th Cir. 1988).

In this case, the state concedes that defense counsel made the following four arguments to the jury, which did not receive appropriate consideration due to the Hitchcock violation: "(1) the defendant did not personally kill the victim, (2) the defendant was only fifteen years old when he committed his prior robberies, (3) the defendant had been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice." Smith, 758 F.Supp. at 693. In addition to these four circumstances, the district court reviewed the record and various proffers, and found that the sentencing court precluded the presentation of the following ten mitigating factors:

> [5] Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; [6] Smith was guilty under the felony murder doctrine; [7] a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for

> parole after eight or ten years, even though he too was guilty of the same three underlying felonies . . . .
>
> . . . [8] [Smith] had a long-term history of alcohol and substance abuse; [9] [Smith] suffered from grand mal epilepsy; [10] [Smith] was, for all practical purposes, abandoned by his mother and abused by his grandmother; [11] [Smith] had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; [12] [Smith] was mistakenly incarcerated at an adult institution when he was convicted of robbery at age 15; [13] [Smith] was known to be non-violent, meek and soft-spoken; and [14] [Smith] was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

Smith, 758 F.Supp. at 694. The state argues that the sentencing court did not prevent Smith's counsel from presenting evidence concerning these last ten circumstances; instead, counsel strategically chose not to present such evidence. Therefore, we should not consider these mitigating factors when conducting our harmless error review.

Although not cited, the state's argument resembles the one made in Bolender v. Singletary, 16 F.3d 1547 (11th Cir.), cert. denied, 115 S.Ct. 589 (1994). In Bolender, the district court found that the sentencing court did not preclude the presentation of mitigating background evidence. Bolender, 16 F.3d at 1566. Relying on the district court's factual determination, this court concluded that "[t]he decision not to introduce the background evidence was the product of strategy," and, therefore, the sentencing court did not commit a Hitchcock violation. Bolender, 16 F.3d at 1566. The factual and procedural posture of Bolender, however, make it distinguishable. Unlike Bolender, the district court in this case specifically found that the sentencing court precluded the presentation of the above mitigating factors, and, as we indicated in our previous decision, "the record well supports the district court's findings of fact." Smith, 970 F.2d at 766.[5] Thus, the Hitchcock error in this case included the improper consideration of mitigating evidence that was in fact presented as well as the preclusion of other potential mitigating evidence. As a result, in conducting our harmless error analysis, we must consider all of the fourteen mitigating circumstances listed above (the four that were presented and the ten that were precluded from presentation).

When reviewing trial errors for harmlessness, federal habeas corpus courts no longer utilize the Chapman

"harmless beyond a reasonable doubt" standard; instead, they must apply the less onerous standard described in Kotteakos v. United States, 328 U.S. 750 (1946).[2] See Brecht, 113 S.Ct. at 1714, 1722. "Hitchcock errors are 'trial errors' governed by Brecht." Horsley, 45 F.3d at 1492; see also Bolender, 16 F.3d at 1567. Therefore, we must decide whether the Hitchcock error in this case "had substantial and injurious effect or influence in determining" Smith's death sentence. Brecht, 113 S.Ct. at 1712 (quoting Kotteakos, 328 U.S. at 776).

The Supreme Court has recently clarified that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." O'Neal v. McAninch, 115 S.Ct. 992, 994 (1995).

---

[1] In other words, the district court did not clearly err in making its findings of fact, nor did it commit an abuse of discretion in denying the state's belated request for an evidentiary hearing.

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[2] We note that the circuits are split as to whether the Kotteakos standard should be applied if the state courts

Thus, Smith points out that if we are uncertain as to whether the Hitchcock error was harmless, we must rule in his favor. Given the district court's factual determinations concerning the wealth of mitigating evidence that was both presented and precluded, we can only conclude that the Hitchcock error in this case had a substantial effect on the outcome of Smith's sentence.

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[2] (con't) have not conducted a harmless error analysis under Chapman. Compare Tyson v. Trigg, 50 F.3d 436, 446-47 (7th Cir. 1995) (federal habeas corpus courts should apply the Kotteakos standard even if state courts have not conducted a Chapman analysis); Horsley v. State of Ala., 45 F.3d 1486, 1492 n.11 (11th Cir. 1995) (same); with Horsley, 45 F.3d at 1498 n.3 (Hatchett, J., dissenting) (Chapman standard applies when a federal habeas corpus court is the first court to conduct a harmless error analysis); Williams v. Clark, 40 F.3d 1529, 1540-41 (8th Cir. 1994) (same), cert. denied, 115 S.Ct. 1397 (1995); Fields v. Leapley, 30 F.3d 986, 991 (8th Cir.) (same); Starr v. Lockhart, 23 F.3d 1280, 1291-92 (8th Cir.) (same), cert. denied, 115 S.Ct. 499 91994); Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993) (same), cert. denied, 114 S.Ct. 1631 (1994). We are not concerned with this split, however, because the Florida Supreme Court conducted a Chapman harmless error analysis in this case. Thus, the Kotteakos standard clearly applies.

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CONCLUSION

Accordingly, we affirm the district court's order granting Smith habeas corpus relief because the Hitchcock error committed at his sentencing was not harmless under the Brecht standard.

AFFIRMED

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FRANK SMITH,

Petitioner,

v. TCA 90-40035-WS

HARRY K. SINGLETARY,

Respondent.

ORDER

On June 8, 1990, this court granted habeas corpus relief to Petitioner Frank Smith based on the state court's error in precluding both presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The court found that the State failed to prove, beyond a reasonable doubt, that the error was harmless under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990). The Court of Appeals for the Eleventh Circuit affirmed. Smith v. Singletary, 970 F.2d 766 (11th Cir. 1992), vacated, 113 S.Ct. 1940, 123 L.Ed.2d 646 (1993).

While the State's petition for writ of certiorari was pending, the United States Supreme Court determined that the beyond-a-reasonable-doubt harmless error standard enunciated in Chapman should not be used to determine whether a petitioner is entitled to habeas corpus relief. Brecht v. Abrahamson, 507 U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Instead, said the Supreme Court, a district court on collateral review should determine whether trial error was harmless under the standard announced in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946). In Kotteakos, the Court held that, to obtain relief in a habeas case, a petitioner must prove that trial error "had substantial and injurious effect or influence in determining the jury's verdict". Brecht, 123 L.Ed.2d at 363 (quoting Kotteakos, 328 U.S. at 776).

In this case, on April 26, 1993, the Supreme Court granted the State's petition for writ of certiorari, vacated the judgment, and remanded the case to the Eleventh Circuit for further consideration in light of Brecht v. Abrahamson. The case is now before this court upon remand from the Eleventh Circuit for consideration of the Brecht issue.

I.

Late in the evening of December 12, 1978, Frank Smith and two accomplices went to a convenience store in Wakulla County, Florida, and robbed store clerk Sheila Porter of money belonging to her employer. The three men abducted Porter and drove her to a motel room where they all committed sexual battery upon her. Later, they took Porter to a wooded area where she was shot and killed, execution style. '

Smith was found guilty of robbery, kidnapping, sexual battery, and first-degree murder. He was sentenced to death in accordance with the jury's recommendation. After Smith's conviction and sentence were affirmed on appeal, after his requests for post-conviction relief were denied by the state courts, and after his first federal petition for writ of habeas corpus was denied by this court, the United States Supreme Court held unconstitutional a jury instruction used in another Florida case to describe what mitigating factors could be used to determine a capital sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987). The Supreme Court decided that the instruction, which limited the jury's consideration of mitigating circumstances to only those mitigating circumstances enumerated in the Florida death penalty statute, was contrary to the holding in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (the Eighth Amendment,

applicable to the states through the Fourteenth Amendment, requires that a sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death).

Because, in this case, the state trial judge gave virtually the same instruction as that given in Hitchcock, Smith returned to the courts to raise a claim under the newly-decided Hitchcock case. In responding to the claim, the State conceded that the trial court committed error under Hitchcock but argued that the error was harmless. On a motion for postconviction relief, the state courts agreed with the State's argument that no relief was merited because, under the beyond-a-reasonable-doubt standard announced in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the erroneous instruction was harmless. In contrast, on a second petition for writ of habeas corpus, this court found that the State failed to prove, beyond a reasonable doubt, the harmlessness of the challenged instruction--an instruction that erroneously prevented the presentation and consideration of substantial nonstatutory mitigating evidence.

II.

Many years ago, in Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed.2d 1557 (1946), the

Supreme Court said that, for nonconstitutional error, reversal is appropriate only when the error has "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 U.S. at 776. Years later, in Chapman, 386 U.S. at 24, the court held that a conviction or sentence obtained in violation of the Constitution must be vacated unless error was harmless beyond a reasonable doubt. Recently, in Brecht, the Court decided that the Kotteakos standard, and not the Chapman standard, should be used when federal courts find--on collateral review of state convictions and sentences--constitutional error of the trial type.

Justice Rutledge explained the Kotteakos standard as follows:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the

> error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, 328 U.S. at 764-65 (cite omitted). The standard does not require a showing that, but for the error, the jury would have decided in the defendant's favor. See Kotteakos, 328 U.S. at 763 (it is not the reviewing court's function to speculate about the probability of reconviction). Neither is it relevant whether the reviewing court is persuaded that the defendant is guilty or deserving of the death penalty. See Kotteakos, 328 U.S. at 763 (it is not the reviewing court's function to determine guilt or innocence). The essential inquiry concerns the impact of the error upon the minds of the jury. If a "grave doubt" exists as to whether the error "substantially influenced" the jury's decision, then relief for the defendant is merited.

Applying the Kotteakos standard to the facts of this case, the court again finds that the petitioner is entitled to relief. At the very least, a grave doubt exists as to whether the Hitchcock error substantially influenced the jury's decision. As this court previously found, there was substantial, significant nonstatutory mitigating evidence available to Smith that, but for the erroneous instruction, trial counsel would have introduced for the jury's consideration. See Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990)

(describing the credible nonstatutory mitigating evidence available to Smith). To be sure, a small portion of the nonstatutory mitigating evidence was, in fact, presented to the jury as trial counsel tried to stretch the statutory mitigating factors to encompass what were, in essence, nonstatutory factors. The greater portion of the nonstatutory mitigating evidence, however, was not introduced at trial because of the constraints imposed upon the entire sentencing process by the Hitchcock error. Indeed, under the instruction given by the trial court, nonstatutory mitigating evidence could not be weighed by the jurors as they considered Smith's fate, whether or not counsel introduced, or the jury heard, such evidence. The erroneous instruction thus infected the sentencing process by placing a thumb on death's side of the scale. Under such circumstances, this court cannot say, with fair assurance, that the error did not have a substantial and injurious effect upon the jury's decision to recommend the death penalty.

III.

By order dated June 8, 1990, this court granted habeas corpus relief to Smith because (1) Hitchcock error infected Smith's sentencing proceeding; and (2) such error was harmful under the standard announced in Chapman v. California, 386 U.S. at 18. By today's order, the court grants habeas corpus relief to Smith because (1) Hitchcock error infected Smith's sentencing proceeding; and (2) such error was

harmful under the standard announced in Kotteakos, 328 U.S. at 750. With changes made to accommodate the analysis now required under Kotteakos and Brecht, the court otherwise adopts the discussion contained in its order of June 8, 1990.

Accordingly, it is ORDERED:

1. Smith's petition for writ of habeas corpus is GRANTED unless the State, within a reasonable period of time, either resentences Smith in a proceeding that comports with Hitchcock or vacates the death sentence and imposes a lesser sentence consistent with law.

2. On all other grounds, the relief requested by Smith is DENIED.

3. The clerk is directed to enter judgment accordingly.

DONE AND ORDERED this 10th day of June, 1994.

William Stafford
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3831

D.C. Docket No. 90-40035

FRANK ELIJAH SMITH,

Petitioner-Appellee,
Cross-Appellant,

versus

HARRY K. SINGLETARY,

Respondent-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(August 18, 1992)

Before TJOFLAT, Chief Judge, HATCHETT and EDMONDSON, Circuit Judges.

PER CURIAM:

In this capital case, the state trial judge prevented defense counsel from presenting and the jury from considering mitigating circumstances not listed in the Florida death penalty statute. Fla.Stat. §921.141. The district court ruled that this Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987), error was not harmless beyond a reasonable doubt. Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990).

Our review indicates that the record well supports the district court's findings of fact, and the district court faithfully applied the Supreme Court's and this circuit's precedents to the facts. This court is unable to say that the Hitchcock error is not harmful beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Accordingly, the district court is affirmed.*

AFFIRMED

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* The history of this case is found at Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 3129, 77 L.Ed.2d 1379 (1983); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988); Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989); Smith v. State, 556 So.2d 1096 (Fla. 1990); and Smith v. Dugger, 493 U.S. 1064 (1990).

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FRANK SMITH,

Petitioner,

v. TCA 90-40035-WS

RICHARD L. DUGGER, et al., ORDER

Respondents.

This cause is before the court upon Frank Smith's second petition for writ of habeas corpus (document 1). Due to the important constitutional matters here presented, I feel obliged to set forth in detail my analysis for the benefit of those charged with the inevitable review of my decision in the federal appellate process.

I. BACKGROUND

A. Facts

The facts leading to Smith's conviction are well documented in the voluminous record of this brutal murder case. Briefly, on the evening of December 12, 1978, Smith, along with two accomplices, Johnny Copeland and Victor Hall, robbed a convenience store in Wakulla County, Florida. They then abducted the store clerk, Sheila Porter,

and took her to a motel where they each committed sexual battery upon her. Victor Hall testified that the three men later drove Ms. Porter to a wooded area. There, Hall waited in the car while Smith and Copeland took her into the woods. Hall testified that he heard three gunshots, after which Copeland and Smith returned to the car alone. Sheila Porter's body was found two days later with three bullet wounds in the back of her head.

B. Procedural History

Found guilty of robbery, kidnapping, sexual battery, and first-degree murder, Smith was sentenced to death in accordance with the jury's recommendation. The sentencing judge found and weighed the following six aggravating factors --

> (1) That the defendant had two prior convictions for violent felonies (robberies).
>
> (2) That the murder was committed in the course of an enumerated felony (kidnapping).
>
> (3) That the murder was committed to avoid arrest.
>
> (4) That the murder was committed for pecuniary gain.
>
> (5) That the murder was heinous, atrocious and cruel.
>
> (6) That the murder was cold, calculated and premeditated --

against only one mitigating factor -- that Smith was nineteen (19) years of age when the crime was committed.

Smith appealed his conviction and death sentence to the Florida Supreme Court. Finding no reversible error, the state supreme court affirmed Smith's convictions and death sentence, and certiorari review was subsequently denied. Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145, 103 S.Ct. 2139, 77 L.Ed.2d 1379 (1983).

The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state trial court seeking a stay of execution and post-conviction relief pursuant to Fla.R.Crim.P. 3.850. The trial court refused to grant a stay and denied Smith's 3.850 motion. The Florida Supreme Court affirmed the denial of post-conviction relief and further denied Smith's original petition for a writ of habeas corpus raising the single issue of ineffective assistance of appellate counsel. Smith v. State, 457 So.2d 1380 (Fla. 1984).

On October 13, 1984, Smith filed a petition for writ of habeas corpus in this court. Having stayed Smith's execution to permit time for consideration of his petition, this court held that the first ten of Smith's eighteen claims were procedurally barred. The remaining eight claims were denied on the merits without further evidentiary proceedings.

Raising six issues, Smith appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit affirmed this court's decision after finding no violation of Smith's constitutional rights. Smith v. Dugger, 840 F.2d 787 (11th Cir. 1988). Smith thereafter filed a petition for rehearing in which he raised, inter alia, a claim under Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987). Hitchcock was decided by the United States Supreme Court after this court's decision and while Smith's case was on appeal in the Eleventh Circuit. Rehearing was subsequently denied but without prejudice to Smith's presenting his unexhausted Hitchcock claim to the Florida state courts. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). The Eleventh Circuit made clear that Smith's unexhausted Hitchcock claim was not foreclosed from federal review in a subsequent action, after exhaustion. Smith filed a timely petition for certiorari which is currently pending in the U.S. Supreme Court.

On July 31, 1989, Smith filed a second Rule 3.850 motion in state trial court. He raised twelve (12) claims, including a claim of error under Hitchcock. All claims but one were found to be procedurally barred. The one exception -- Smith's Hitchcock claim -- was denied on the merits. On appeal, the Florida Supreme Court held that, while the trial court's instructions to the jury indeed violated Hitchcock, such error was harmless beyond a reasonable doubt. All other

claims were found to be procedurally barred. Smith v. State, 556 So.2d 1096 (Fla. 1990).

While Smith's Hitchcock claim was still being considered in the Florida courts, the Governor of Florida issued a second death warrant, setting Smith's execution for 7:00 a.m. on February 9, 1990. After the Florida Supreme Court denied all relief on February 8, 1990, but before his scheduled execution the following morning, Smith filed with this court a motion for stay of execution along with his second petition for writ of habeas corpus. With but a few short hours before Smith scheduled early morning execution, and needing time to give proper consideration to both Smith's 176-page petition for writ of habeas corpus as well as the state's response, the court granted Smith's request for a stay. A complete, orderly record has now been compiled in this court, and Smith's claims are ripe for review.

II. THE HITCHCOCK CLAIM

Relying on Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987), and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), petitioner first contends that the jury and the judge in the state trial court were unconstitutionally precluded from considering -- and defense counsel from presenting -- mitigating circumstances not enumerated in the Florida death penalty statute. Fla.Stat. §921.141. In Lockett, the

Supreme Court concluded that the eighth and fourteenth amendments require a sentencer to consider all relevant mitigating evidence in capital cases. Despite Lockett, the advisory jury in Hitchcock was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances. The Supreme Court found that, in the absence of a showing that the error was harmless, such exclusion of mitigating evidence rendered Hitchcock's death sentence invalid. The Court reiterated its holding in Lockett that the eighth amendment, applicable to the states through the fourteenth amendment, requires that a capital sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death.

In this case, the state trial judge gave virtually the same instruction as that given in Hitchcock. At the conclusion of the penalty phase, the trial judge instructed the jury: "The mitigating circumstances which you may consider, if established by the evidence, are these: [listing the seven statutory mitigating circumstances enumerated in the Florida death penalty statute]." In Hitchcock, the trial judge instructed: "The mitigating circumstances which you may consider shall be the following: [listing the same seven statutory mitigating circumstances]." As in Hitchcock, the jury in this case was directed to

consider only statutory factors in mitigation. As in Hitchcock, then, the jury instruction given in this case violated petitioner's eighth amendment right to "present any and all relevant mitigating evidence that is available." Hitchcock, 95 L.Ed.2d at 353 (quoting Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

While conceding that the trial court's instruction was erroneous, the state respondent here argues that both the trial court and the Florida Supreme Court were correct in concluding that the error was harmless. The Eleventh Circuit has said that a Hitchcock violation is subject to harmless error analysis. Demps v. Dugger, 874 F.2d 1385, 1389 n.12 (11th Cir. 1989) (citing cases), cert. denied, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990). Such analysis is governed by the strict "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, the court must presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation. See Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987) (discussing Chapman standard where constitutionally-proscribed evidence was admitted at trial). If there remains any possibility that the jury's sentencing decision was affected by the erroneous jury instruction, and if the state cannot refute that possibility, the error cannot be deemed harmless.

While state court factual findings are entitled to a presumption of correctness under 28 U.S.C. §2254(d), harmlessness of a constitutionally erroneous jury instruction is not an issue of fact entitled to such a presumption. It is, instead, a mixed question of law and fact meriting independent consideration by a federal habeas court. This court, therefore, cannot simply defer to the state courts' findings of harmlessness. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (finding Hitchcock error not harmless despite state courts' findings to the contrary).

Mindful that there are no precise guidelines for determining harmlessness in a Hitchcock context, see Demps, 874 F.2d at 1385 (all three judges on the panel wrote separate opinions about how to analyze the Hitchcock claim), the court finds instructive, a review of Eleventh Circuit cases involving Hitchcock claims.

In Demps, the petitioner was sentenced to death for the killing of a fellow prison inmate. Demps challenged his sentence on Hitchcock grounds, arguing that his jury was impermissibly precluded from considering nonstatutory mitigating circumstances. The Eleventh Circuit panel agreed, the trial judge having given an instruction virtually identical to the one erroneously given in Hitchcock.

Judge Fay, writing the lead opinion, examined each of the four types

of evidence which Demps alleged would have influenced the jury to recommend life, determined that none of the evidence excluded from the jury's consideration would have affected its sentencing recommendation, and thus concluded that any error which may have occurred was harmless. Judge Fay emphasized that, in evaluating whether a Hitchcock error is harmless, a court must -- after an in-depth review of the entire record -- "determine beyond a reasonable doubt that the proposed mitigating evidence regarding the defendant's character would not have influenced the jury to recommend a life sentence." Demps, 874 F.2d at 1390.

Judge Clark agreed with Judge Fay that Demps was not entitled to a new sentencing hearing as a result of the erroneous Hitchcock instruction. He was unable to agree with Judge Fay, however, that a harmless error analysis was appropriate. Judge Clark opined that, "[w]here there is no nonstatutory mitigating evidence there can be no Hitchcock error and harmlessness need not be considered." Id. at 1396. Because he concluded that Demps failed to present even arguably credible evidence of nonstatutory mitigating circumstances, Judge Clark did not believe that the court needed to engage in harmless error analysis. He did suggest, however, that a case should be returned to the state court for resentencing if any credible nonstatutory evidence exists, whether such evidence was heard but excluded from consideration or whether it was not

even offered because Florida law at the time taught that such evidence was not admissible. Id. at 1395.

Largely because he felt the record contained no factual findings on Demps's claims of mitigating evidence, Judge Johnson dissented from the majority's finding that Demps was not entitled to a resentencing hearing under Hitchcock. Judge Johnson believed that the case should be remanded to the district court for findings as to the truthfulness of Demps's claims. If the district court were to find that Demps had no true mitigating evidence to offer, Judge Johnson would concede that any error in the jury instructions was harmless. If, on the other hand, the district court were to find any of Demps's claims of mitigating evidence to be true, then Judge Johnson would conclude that excluding the evidence from the jury's consideration would have constituted reversible error.

Citing Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988), Judge Johnson stressed that there is a narrow range of situations in which Hitchcock error may be harmless. In Knight, respondent argued that any Hitchcock error was harmless because "so many aggravating factors were found (four) that no amount of nonstatutory mitigating evidence could change the result in this case." 863 F.2d at 710. In rejecting the state's reasoning, the Eleventh Circuit held:

> No authority has been furnished for this proposition and it seems

> doubtful that any exists. The State's theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of course, that is at the heart of Lockett and its progeny. . . .
>
> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case.

Id. To paraphrase Judge Johnson, the Knight decision leaves little room for the application of harmless error analysis except in two limited situations: (1) where the defense produces no nonstatutory mitigating evidence, and (2) where the nonstatutory mitigating evidence presented is so insignificant that it would not have altered the jury's decision. See Demps, 874 F.2d at 1393 (Judge Johnson, dissenting); Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989).

The Eleventh Circuit has found Hitchcock error to be harmless only three times. See Demps, 874 F.2d at 1385 (error harmless where petitioner failed to present any credible evidence of mitigating circumstances); Tafero v. Dugger, 873 F.2d 249 (11th Cir. 1989) (error harmless where defense counsel

purposely presented no mitigating evidence for strategic reasons), cert. denied; Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (error harmless where "there simply were no nonstatutory mitigating circumstances to consider"), cert. denied, 485 U.S. 982, 108 S.Ct. 1282, 99 L.Ed.2d 493 (1988). In contrast, the court has many times granted relief on Hitchcock/Lockett grounds. See, e.g., Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) (error not harmless where there was significant psychological evidence which the jury, if it followed the court's erroneous Hitchcock instruction, would have considered only it if rose to the level of a statutory mitigating factor -- i.e., only if the jury found Delap committed the crime "under the influence of extreme mental or emotional disturbance"); Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (error not harmless where there was mitigating evidence in the record that petitioner was a model prisoner and "a very nice person [who] got along well with people [and] was never no trouble"); Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) (error not harmless where there was mitigating evidence in the record about petitioner's mental state and his troubled family background, and the state argued only that the Hitchcock/Lockett error was harmless because there were multiple aggravating circumstances); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was evidence in the record of petitioner's mental state, his lack

of an adult criminal record, and the alleged domination of petitioner by his accomplice), cert. denied, 10 S.Ct. 872, 102 L.Ed.2d 995 (1989); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) (error not harmless where there was evidence in the record that petitioner felt remorse for his actions); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (granting relief on Hitchcock/Lockett claim, without discussion of harmlessness, where there was mitigating evidence in the record of petitioner's steady employment, below-average intelligence, and history of drug abuse), cert. denied, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

A synthesis of the above-cited cases leads this court to conclude that, in reviewing a Hitchcock claim, a federal district court must first determine whether there was any credible nonstatutory mitigating evidence that the jury either did hear or could have head had the teachings of Hitchcock and its progeny been known at the time. If, after reviewing the entire record, the court concludes that petitioner has failed to produce or proffer any credible nonstatutory mitigating evidence, then the court must find that the Hitchcock error, if any, was harmless. If, as here, petitioner produced substantial mitigating evidence, the federal district court will likely find the exclusion of such evidence to be harmful error, because the presumption of prejudice will be very difficult for the state to rebut. It is only when petitioner produces some, but not substantial mitigating

evidence that the district court's role is unclear. Indeed, the Eleventh Circuit has more than once alluded to conflicting viewpoints about the role of the habeas court in such a situation. See Tafero, 873 F.2d at 252 n.5; Delap, 890 F.2d at 306 n.23.

In this case, as mentioned previously, the state urges the court to deny all relief on the basis of harmless error. The thrust of the state's argument, however is difficult to discern. On the one hand, the state suggests that defense counsel did, in fact, argue to the jury several alleged mitigating factors which did not fit clearly within the confines of the enumerated statutory factors. The state notes, for example, that defense counsel included in his arguments to the jury that (1) the defendant did not personally kill the victim, (2) the defendant was fifteen years old when he committed his prior robberies, (3) the defendant had been drinking gin and smoking marijuana the evening of the crime, and (4) the defendant was influenced by the dominant personality of his accomplice. The state writes:

> Clearly from the tone of the closing arguments presented, [defense counsel] intended those jurors to consider the minuteness of evidence in relationship to those mitigating factors. He was desirous that the jury and judge find statutory mitigation but he made it perfectly clear that the slightest evidence in "mitigation" be considered.

Document 7, p. 35 (emphasis in original).

If the state is suggesting that the Hitchcock error is harmless because defense counsel could and did, both present and argue, nonstatutory mitigating factors, the suggestion must be rejected. The Eleventh Circuit has made it abundantly clear that the actual introduction of nonstatutory mitigating evidence is meaningless if the jury is instructed not to consider such evidence. Delap, 890 F.2d at 304 (citing cases). Furthermore, the error is not rendered harmless just because the judge himself hears and considers nonstatutory mitigation. Jones, 867 F.2d at 1280 ("[A] trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error"); Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987). It follows, then, that the error does not become harmless just because the state trial judge later states -- as he did in this case -- that "[e]ven if the court had been presented all of this alleged mitigating evidence now being offered by the defendant, it would have in no way altered my decision to impose the death penalty." See document 7, p. 35.

The state also suggests that this case is similar to Clark and Tafero, both of which resulted in findings of harmlessness because there were no mitigating factors. If, by drawing an analogy to Clark and Tafero, the state is suggesting that there simply is no

nonstatutory mitigating evidence in this case, the record belies such suggestion. As petitioner points out, there was evidence in the record from which the jury could have concluded that: (1) Smith was not the triggerman who killed the victim; (2) Smith tried to dissuade his accomplice, Johnny Copeland, from killing the girl; (3) Smith was guilty under the felony murder doctrine; (4) a "cooperating" accomplice, Victor Hall, was expecting to receive a life sentence, with eligibility for parole after eight or ten years, even though he too was guilty of the same three underlying felonies; and (5) Smith may have been intoxicated at the time of the offense.

Petitioner also indicates that there was substantial "nonrecord" nonstatutory mitigating evidence which could have been presented had the teachings of Hitchcock been available at the time of Smith's trial. For example, petitioner has filed affidavits, letters, and reports which indicate, inter alia, that defendant: 91) had a long-term history of alcohol and substance abuse; (2) suffered from grand mal epilepsy; (3), was, for all practical purposes, abandoned by his mother and abuse by his grandmother; (4) had a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter, and lack of medication for his medical needs, especially his epilepsy; (5) was mistakenly incarcerated at an adult institution when he was convicted of robbery at age

15; (6) was known to be non-violent, meek and soft-spoken; and (7) was diagnosed as having diffuse and long-standing brain damage, consistent with his history of alcohol abuse and epilepsy disorder.

While conceding that some nonstatutory mitigating evidence was both presented and argued to the jury, the state neither addresses this alleged record mitigating evidence nor explains why this court might find such evidence to be insubstantial or incredible. As to the proffered "nonrecord" nonstatutory mitigating evidence, the state neither contests the veracity of the proffered evidence nor offers any explanation -- other than conclusory comments about the enormity of Smith's crime -- about why the evidence would not have influenced the jury to recommend a life sentence.

Instead, the state directs the court's attention to the fact that a Lockett issue was the basis for a previous unsuccessful attack on trial counsel's representation under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The state writes: "Necessarily in finding [defense counsel] made tactical decisions in the presentation of mitigating evidence at the penalty phase of the 1979 trial, and finding no prejudice under Strickland v. Washington, the harmless error analysis regarding Hitchcock is made much simpler." Document 7, p. 30.

Presumably, the state wants the court to ignore the proffered evidence because the court previously found, in a Strickland setting, that counsel chose not to present mitigating evidence for strategic reasons. Such finding allowed this court, as well as the Eleventh Circuit, to conclude (without addressing the prejudice prong of the Strickland test) that petitioner's Strickland claim was without merit.

Mindful that claims under Strickland and Hitchcock are separate and distinct, the court notes that defense counsel's tactical decisions were made in the context of the law as it then existed. The standard jury instruction promulgated under such law informed jurors that "the mitigating circumstances which you may consider, if established by the evidence, are these [listing the seven statutory mitigating factors]." The record makes it evident that counsel developed both his strategies as well as his arguments under the constraints of that jury instruction. To do so was reasonable at the time. Only later did the Supreme Court decide that it was error for the trial court to give the constraining instruction. Hitchcock, 95 L.Ed.2d at 347. That later decision did not make counsel's prior performance ineffective under Strickland. It did, however, make it necessary for this court to now determine whether the erroneous instruction affected the jury's decision as to penalty. To make that determination, the court must look at the various types of nonstatutory

mitigating factors which either were presented, or could have been presented, to the jury. Because of the change in the law, this court cannot merely ignore the evidence on the ground that defense counsel was previously found to have made a tactical decision not to present certain kinds of evidence during the penalty phase of the trial.

Perhaps the court would think differently if there were reason to believe that counsel's strategies were not affected by the erroneous instruction. In Clark, 834 F.2d at 1566-70, for example, petitioner's ineffective assistance of counsel claim was denied because the court found that counsel -- after thorough investigation -- made a tactical decision to introduce no testimony during the penalty phase of Clark's trial. That same tactical decision was used to support the court's conclusion that the Hitchcock error was harmless. The court wrote:

> Here, however, there simply were no nonstatutory mitigating circumstances to consider. Clark did not introduce any evidence that would support the existence of a nonstatutory mitigating circumstance. As explained supra, Clark's counsel, after her investigation, made a tactical decision that any testimony at the penalty phase could only prove harmful. Thus, Clark failed to introduce any mitigating evidence whatever. . . . Having failed to

> produce evidence of any nonstatutory mitigating factors, Clark can hardly complain that the trial court restricted the jury's ability to consider them. We therefore conclude that any Hitchcock error was harmless.

834 F.2d at 1569-70. Importantly, there was no evidence that counsel's strategies would have been different had she defended the case post-Hitchcock. At the time of trial, and without the benefit of Hitchcock, she decided that there simply was no credible evidence of mitigating factors. Two years later, and despite the Hitchcock decision, there was still no credible evidence of mitigating factors. In such a case, counsel's tactical decision not to present mitigating evidence supports the court's denial of both a Strickland and a Hitchcock claim. Here, however, the situation is different.

In Smith's case, the record indicates that trial counsel, now a state circuit judge, felt constrained by the court's erroneous instruction. In fact, as the state apparently concedes, he tried to stretch the statutory mitigating factors to permit consideration of what were most probably nonstatutory factors. In addition, he has filed an affidavit describing how his strategies were limited by the instruction which he knew would be given to the jury. Perhaps most significantly, unlike in Clark, there was nonstatutory mitigating evidence in this case which either was presented or

could have been presented by counsel and considered by the jury had the erroneous jury instruction not been given. In sum, the record before me suggests that counsel's strategy would have been different had the case been tried post-Hitchcock. Under such circumstances, this court cannot accept the state's premise that the tactical decision which supported the denial of petitioner's ineffective assistance of counsel claim should, ipso facto, be used to deny petitioner's Hitchcock claim.

Because the State of Florida has placed great importance upon the advisory jury in the Florida sentencing scheme, this federal court must be especially cautious when speculating about the effect of a constitutional error on that state advisory jury. Indeed, as explained earlier, this court is required to presume prejudice unless and until the state proves beyond a reasonable doubt that the erroneous sentencing instruction did not contribute to the jury's sentencing recommendation.

The brutal, senseless murder of Sheila Porter was a horrible crime and completely justified the finding of many aggravating factors. Yet, under the law binding upon this court, the State of Florida is required to do more than point this court to the enormity of the crime in order to defeat petitioner's claim for relief. Knight, 863 F.2d at 710 (relief granted where the state's only argument was that there were multiple aggravating circumstances

justifying the imposition of the death penalty). Here, the state has done little else. My duty, then, is clear. Having determined that (a) substantial nonstatutory mitigating evidence exists in this case, (b) the state has failed to prove the harmlessness of the erroneous instruction which prevented the introduction and/or consideration of such evidence by the state court jury, and (c) this court should not substitute its judgment for the considered judgment of a Florida jury properly instructed on sentencing under existing constitutional law, this court must GRANT conditional relief on the Hitchcock claim of petitioner Frank Smith.

III. REQUEST FOR EVIDENTIARY HEARING

The state trial court did not hold an evidentiary hearing to determine the harmfulness of the Hitchcock error in Smith's case. Had the state in any manner contested the veracity of the proffered nonstatutory mitigating evidence, or had the record been less clear about the constraining effect of the erroneous instruction on the tactics of defense counsel, this court might be obliged to hold such a hearing. As the record stands, however, the Hitchcock issue is clearly focused for this court and can be resolved without an evidentiary hearing here. Accordingly, petitioner's request for an evidentiary hearing before this court is DENIED.

IV. OTHER CLAIMS

Smith raises five additional claims in his petition for writ of habeas corpus. Of these five claims, four (claims III - VI) were raised before the trial court in a motion for post-conviction relief. The trial court denied Smith's motion, finding that each of the four claims was procedurally barred. The Florida Supreme Court affirmed the trial court's decision, agreeing that the four claims were procedurally barred. Smith v. [sic] clearly relied on procedural bar as an independent state basis for disposition of these four claims, there can be no federal habeas review unless Smith can show "cause" for the default and "prejudice attributable thereto." Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Because the court concludes that Smith has not shown adequate "cause" for his default, Claims III through VI of Smith's petition shall not be addressed here.

The remaining claim in Smith's petition - that Smith was denied his right to a full, fair, and independent determination of his second motion for post-conviction relief -- fails to raise an issue of federal law. Smith basically complains that the trial judge signed an order prepared by the state. While others might question the propriety of such action, federal law

clearly does not require that a judge personally prepare his own orders. Review of the record indicates that a fair hearing was held (albeit not an evidentiary hearing), and there is nothing to indicate that the order, by whomever prepared, does not reflect the trial judge's ruling. Absent any error under federal law, this court will not question the procedures used by the state trial court. Finding no such error, the court concludes that Smith is not entitled to relief on Claim II of his petition for habeas corpus, and the same is DENIED.

IV. CONCLUSION

Based upon the foregoing analysis, the court concludes that petitioner has met his burden of establishing that an erroneous jury instruction given during the course of his sentencing proceeding unconstitutionally precluded presentation and consideration of mitigating circumstances not enumerated in the Florida death penalty statute. The state has not proven beyond a reasonable doubt that the giving of this erroneous instruction to the sentencing jury was harmless. Accordingly, it is ORDERED:

The petition for writ of habeas corpus is hereby GRANTED unless the state, within a reasonable period of time, either resentences Smith in a proceeding that comports with Lockett/Hitchcock or vacates the death sentence and imposes a lesser sentence consistent with law. All other relief

requested by petitioner Smith is hereby DENIED.

DONE AND ORDERED this 8th day of June, 1990.

William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

SUPREME COURT OF FLORIDA

No. 75,450

FRANK ELIJAH SMITH,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

[February 8, 1990]

PER CURIAM.

Frank Elijah Smith, a prisoner under sentence of death, appeals the denial of relief on his second motion filed under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, §3(b)(1), Fla.Const.

The facts of this case are fully discussed in the prior appeals and collateral challenges involving this appellant. Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989), petition for cert. filed, No. 89-6347 (U.S. Dec. 29, 1989); Smith v. Dugger, 840 F.2d 787 (11th Cir.

1988); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983). This appeal presents only a single issue that is not procedurally barred.

Smith argues that the instruction given by the trial court in this instance, combined with other circumstances of the case, violated the teachings of Hitchcock v. Dugger, 481 U.S. 393 (1987). As the state conceded at argument, the trial court's jury instruction in this instance facially violated Hitchcock by failing to inform the jury that it could consider any and all mitigating evidence submitted by the defense. The question remaining is whether this error is harmless beyond a reasonable doubt.

We have reviewed the record in its entirety and are convinced that there is no reasonable possibility that the error contributed to Smith's sentence. See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla. 1986). Thus, the state has met its burden of proving harmless error. The facts of this murder, which are discussed at length in the prior cases involving this appellant, disclose a heinous and calculated abduction, sequestration and rape of the victim. After the rape, the victim then was transported to an isolated location and slain execution-style. An overwhelming body of aggravating factors was found by the trial court and sustained by this Court on direct appeal. We can entertain no reasonable doubt that the

result of the sentencing hearing would not have been different had the jury heard the proper instruction and considered any available mitigating evidence.

The order of the court below is affirmed. We find all other issues raised by Smith to be procedurally barred. The consolidated application for stay of execution and motion for stay of execution pending filing and disposition of a writ of certiorari in the United States Supreme Court is denied.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, GRIMES and KOGAN, JJ., Concur
BARKETT, J., Dissents with an opinion

NO MOTION FOR REHEARING WILL BE ENTERTAINED BY THIS COURT

BARKETT, J., dissenting.

I cannot conclude beyond a reasonable doubt that the Hitchcock v. Dugger, 481 U.S. 393 (1987), error was harmless. Defense counsel at the trial had conceded in an affidavit that he did not properly develop the available nonstatutory mitigating evidence because he believed the law forbade its introduction as evidence--an erroneous assumption reinforced by the judge's erroneous jury instruction. At the very least, an evidentiary hearing is mandated to consider the testimony proffered by the attorney in his affidavit. Moreover, even without any additional evidence of mitigation, I cannot say that if the jury had been properly instructed, the result would have been the same beyond any reasonable doubt. For example, the jury clearly had questions pertaining to whether Smith or codefendant Copeland fired the fatal shots. During deliberations, the jury asked the judge whether a defendant must be guilty of actually pulling the trigger or whether he may be found to have used a firearm through his association as an accomplice in a murder where a firearm is used. We have previously held that the fact that the defendant might not have been the shooter is a permissible nonstatutory mitigating factor. See, e.g., Taylor v. State, 294 So.2d 648, 652 (Fla. 1974). There were other factors presented that could have been deemed nonstatutory mitigation. Yet, the jury was not told they could consider these factors in deciding the penalty. Accordingly, I

would vacate the sentence and remand for a new sentencing hearing that complies with Hitchcock.

An appeal from the Circuit Court in and for Wakulla County,

Charles D. McClure, Chief Judge - Case No. 87-66

Larry Helm Spalding, Capital Collateral Representative and Billy H. Nolas, Chief Assistant CCR, Office of the Capital Collateral Representative, Tallahassee, Florida,

for Appellant

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for Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3333

FRANK SMITH,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, et al.*

Respondents-Appellees.

*The caption has been altered pursuant to Fed.R.App.P. 439c) to reflect succession of RICHARD L. DUGGER, to Secretary Florida Department of Offender Rehabilitation; TOM BARTON, to Superintendent of Florida State Prison, Starke, Florida; and ROBERT A. BUTTERWORTH, to Attorney General of the State of Florida.

Appeal from the United States District Court
for the Northern District of Florida

(March 9, 1988)

Before RONEY, Chief Judges, HATCHETT and EDMONDSON, Circuit Judges.

RONEY, Chief Judge:

Defendant-Petitioner Frank Smith, sentenced to death in Florida for first-degree murder, appeals a district court order denying him federal habeas corpus relief. Smith raises the following six arguments on appeal:

> (1) his right to a fair trial was abrogated by the trial court's refusal to instruct the jury as to his withdrawal defense to murder;
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> (2) his death sentence constitutes cruel and unusual punishment because the state court failed to make a finding on his individual culpability;
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> (3) his pre-trial statements were taken in violation of his Sixth Amendment right to counsel;
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> (4) he did not receive effective assistance of counsel at the penalty phase of his capital trial;
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> (5) the sentencing proceedings were unreliable and fundamentally flawed; and
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> (6) he is entitled to an evidentiary hearing on his claim that race was used as a factor in the decision to sentence him to death.

There being no showing of a violation of Smith's constitutional rights, we affirm.

Smith was charged, along with co-defendants Johnny Copeland and Victor Hall, with robbery, kidnapping, sexual battery and first-degree murder, based on events occurring on the evening of December 12, 1978. On that date, Smith and his two accomplices robbed a convenience store in Wakulla County, Florida, abducted the store clerk, Sheila Porter, and took her to a motel where they committed sexual battery upon her. Smith's accomplice, Victor Hall, testified that the three men later drove Sheila Porter to a wooded area. There, Hall waited in the car while Smith and Johnny Copeland took her into the woods. Hall testified that he heard three gunshots, and when Copeland and Smith returned to the car, Smith was carrying a gun. They left without Sheila Porter. Two days later, her body was found with three bullet wounds in the back of her head.

Found guilty of first-degree murder as well as the other charges, Smith was sentenced to death in accordance with the jury recommendation. The Florida Supreme Court affirmed Smith's convictions and death sentence on direct appeal. Smith v. State, 424 So.2d 726 (Fla.),[1] cert. denied, 462 U.S. 1145 (1983). The Governor of Florida denied Smith clemency and signed a warrant scheduling his execution. Smith then filed motions in the state

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[1] On direct appeal, Smith raised the following claims: (1) the filing of a second indictment was improper and

court, seeking a stay of execution and post-conviction relief pursuant to Fla. R. Crim. P. 3.850. Both the trial court and the Florida Supreme Court refused to grant a stay and denied Smith 3.850 motion. Smith v. State, 457 So.2d 1384 (Fla. 1984).[2]

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[1] (con't) untimely; (2) the court erred in admitting into evidence certain pre-trial statements; (3) the court erred in admitting evidence of collateral crimes; (4) the court erred in denying his requested instruction on the defense of withdrawal; (5) the imposition of the death sentence in this case violated Enmund v. Florida, 458 U.S. 784 (1982); and (6) the court improperly interpreted and applied the statutory aggravating factors in sentencing Smith to death. Smith v. State, 424 So.2d 726 (Fla.), cert. denied, 462 U.S. 1145 (1983).

[2] Smith's motion under Rule 3.850 raised the following issues: (1) that jurors were improperly excused for cause due to their opposition to capital punishment and that, even if they were properly excused, death qualifying the jury deprived Smith of a fair trial by a jury drawn from a representative cross-section of the community; (2) that the jury instruction given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; (3) that the state at trial was improperly allowed to bolster the credibility of its principal

Smith filed a petition for writ of habeas corpus in federal district court

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[2] (con't) witness before the defense had attempted to impeach him, violating Smith's right of confrontation; (4) that the trial court erred in refusing to instruct the jury on the defense of withdrawal; (5) that the giving of jury instructions on all lesser degrees of homicide, attempted murder and felony murder is a practice conducive to arbitrariness in violation of the Eighth Amendment; (6) that instructing the jury on all the statutory aggravating circumstances was improper; (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (8) that the trial court's instruction on mitigating circumstances limited the jury's consideration to statutory mitigating circumstances and that the court also limited its consideration of mitigating circumstances; (9) that Smith did not receive effective assistance of counsel at trial; and (10) that Smith's sentence of death was a product of systematic racial discrimination in capital sentencing. Smith also filed a petition for writ of habeas corpus in the Florida Supreme Court, raising the issue of ineffective assistance of counsel on appeal. Smith v. State, 457 So.2d 1380 (Fla. 1984).

raising eighteen different claims[3] and Smith's execution was stayed to allow time for consideration of the petition. The district court held that ten of Smith's claims were procedurally barred, denied the remaining eight claims on

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[3] The following fifteen claims were listed in Smith original petition: (1) improper admission of Smith's pre-trial statements; (2) jury instructions allowed for the death penalty to be imposed absent a jury finding that Smith actually killed or intended to kill; (3) refusal to instruct on the proffered defense of withdrawal; (4) impermissible excusal for cause of jurors with conscientious objections to the death penalty; (5) violation of Smith's constitutional right to a jury comprised of a fair cross-section of the community; (6) impermissible bolstering by the state of its own key witness before he had been impeached; (7) incorrect application of aggravating circumstances; (8) blanket instructions on all lesser included offenses at the guilt-innocence phase influenced outcome at penalty phase; (9) blanket instructions on aggravating circumstances wrongly given; (10) consideration of non-statutory mitigating circumstances precluded; (11) unconstitutional burden shifting at the penalty phase; (12) incorrect instruction at the sentencing phase respecting the jury vote; (13) race used as a factor in the decision to put Smith to death; (14) denial of an evidentiary

the merits without an evidentiary hearing and granted a certificate of probable cause.[4]

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[3] (con't) hearing on the issue of racial discrimination; and (15) ineffective assistance of counsel at sentencing. Smith later supplemented his petition with three additional claims: (1) ineffective assistance on direct appeal; (2) improper consideration of ex parte information by Florida Supreme Court; and (3) inadequate notice of amended indictment.

[4] The district court found that the following issues were not cognizable due to procedural default: (1) that jurors were improperly excused for cause due to their objections to the death penalty; (2) that even if excusing jurors because of their objections to the death penalty was proper, excusal in this case deprived the petitioner of a jury drawn from a representative cross section of the community; (3) that at trial, the state was improperly permitted to bolster the credibility of its witness in violation of Smith's right of confrontation; (4) that the Florida procedure which allows a jury charge on all lesser offenses was a violation of due process because it invites inevitably arbitrary results; (5) that it was error to instruct the jury on all the statutory aggravating circumstances regardless of whether there was support for them because it created the danger that the jury's advisory verdict was

[4] (con't) based on improper aggravating circumstances or that the jury applied the circumstances in an overbroad manner; (6) that the trial court improperly precluded consideration of non-statutory mitigating circumstances; (7) that the burden of proof was unconstitutionally shifted to petitioner during the penalty phase; (8) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (9) that the Florida Supreme Court improperly reviewed ex parte information about defendants in capital cases; and (10) that the trial court violated Smith's due process rights by refusing to instruct the jury on his withdrawal defense. The court reached the merits of the following claims: (1) improper admission of certain pre-trial statements; (2) failure to instruct the jury that to impose the death penalty, it had to find that Smith actually killed or intended to kill; (3) overbroad application of four aggravating circumstances; (4) the death penalty in Florida is administered in a racially discriminatory manner; (5) entitlement to an evidentiary hearing on race discrimination claim; (6) ineffective assistance of counsel during sentencing; (7) ineffective assistance of counsel on direct appeal; and (8) inadequate notice of superceding indictment.

Failure to Instruct on Withdrawal Defense

Smith asserts that the trial court violated his due process rights by refusing to give a requested instruction on his withdrawal defense. Smith objected to the failure to give the instruction at trial and raised the issue on direct appeal. The State asserts that procedural default bars this Court from consideration of the constitutional claim because Smith previously framed the issue on direct appeal in terms of state law, rather than federal constitutional law. The State argues that the Florida Supreme Court invoked its procedural default rules in refusing to address in the 3.850 appeal the merits of Smith's constitutionally-based jury instruction claim on the ground that the claim "either [was] or could have been presented on appeal. . . ." Smith v. State, 457 So.2d 1380, 1381 (Fla. 1984).

The district court held there was a procedural default. The difficulty with the procedural default argument is found in the "was raised" or "could have been raised" dichotomy. If in fact the constitutionally-based jury instruction issue was raised on direct appeal, it was necessarily ruled on, whether the state court explicitly addressed it or not, and although foreclosed from state collateral attack, it would be available in the federal case as an exhausted claim. If if could have been raised, but was not, it would be barred from any state collateral review, and likewise

barred from federal review. Murray v. Carrier, 477 U.S. 478 (1986).

As far as the state court was concerned, it made no difference as a practical matter, whether the claim was barred on res judicata or procedural default grounds. To a federal court reviewing the case, however, it does make a difference. If the constitutional claim was made in the direct appeal, the failure of the state court to address it on direct appeal in the 3.850 would not bar a review in federal court, either on default or exhaustion principles.

The question of Thomas' preservation of his claim on direct appeal turns on whether the facts of the claim argued as state law error were sufficient to alert the state court of a constitutional issue. Contrast Anderson v. Harless, 459 U.S. 4 (1982) (Petitioner's Sandstrom claim found to be unexhausted because jury instruction argument made on direct appeal relied solely on state law and broad constitutional argument that failure to properly instruct a jury violates the Sixth and Fourteenth Amendments) with Hutchins v. Wainwright, 715 F.2d 512, 519 (11th Cir. 1983) (Objection on direct appeal to admissibility of statements based on hearsay grounds sufficient to present constitutional confrontation clause claim to state court), cert. denied, 465 U.S. 1071 (1984).

We need not decide the procedural default issue here, however, because going to the merits it is apparent there is no substance to the constitutional claim. Smith argues that the due process right to a conviction based on proof of guilt beyond a reasonable doubt requires a trial court to charge the jury on a defense which is timely requested and supported by the evidence. Even if this argument is sound as a matter of principle, it avails Smith nothing because the instruction he now argues should have been given was never requested, and the evidence did not support the instruction he requested.

Smith sets forth his withdrawal defense claim in the following manner: first, he recites the constitutional underpinnings of the right to a theory of defense instruction; second, he notes that under Florida law, withdrawal is a defense to felony murder or to premeditated murder under an accomplice theory; and third, Smith asserts that there is ample evidence to support the defense in his pre-trial statements which were introduced by the State in its case-in-chief. In these statements, Smith confessed to participating in the robbery and kidnapping, but maintained that he tried to talk his accomplice, Johnny Copeland, out of killing the victim.

At trial, Smith requested the following jury instruction for his withdrawal defense:

Ladies and Gentlemen of the Jury, one of the defenses raised in this case is the defense of withdrawal.

It is a valid defense to the charge of felony murder that the defendant withdrew from the commission of the felony upon which the felony murder charge is based before the death of the victim occurred. A party may withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime.

If you find from the evidence that the defendant withdrew from the offenses of robbery and kidnapping before the death of the victim then he is not criminally responsible for the death of the victim and you must find him not guilty of murder.

If on the other hand you are convinced beyond a reasonable doubt that the defendant did not withdraw from the offenses of robbery and kidnapping, and you are otherwise convinced of his guilt beyond a reasonable doubt then you must find him guilty of first degree murder, or a lesser included offense.

This instruction refers to withdrawal only from the underlying felonies as a defense to felony murder. At trial, Smith never submitted or otherwise requested an instruction on withdrawal as a defense to premeditated murder under an accomplice theory.

Smith's felony murder charge was predicated on the offenses of kidnapping and robbery. In order for the jury to be charged with Smith's proposed instruction, Smith had to produce evidence that he withdrew from the kidnapping or the robbery before the victim's death. The record reveals no evidence on Smith's withdrawal from the underlying felonies. On the contrary, Smith admitted full participation in these offenses in his pre-trial statements introduced by the State.

This is no due process violation in the trial court's refusal to give the instruction in these circumstances.

Enmund Claim

In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court held that the death penalty constituted cruel and unusual punishment when a defendant did not kill, attempt to kill, intend to kill or intend that lethal force be applied. Smith contends that, because the state courts never made a specific finding regarding his individual culpability in the murder of Sheila Porter, his death sentence is invalid under Enmund.

Two recent Supreme Court cases have limited and clarified Enmund. In Tison v. Arizona, 107 S.Ct. 1676 (1987), the Court held that a defendant who participates in a felony that results in murder may be sentenced to death constitutionally so long as his participation in the felony was major and his mental state was one of reckless indifference to the value of human life.

In Cabana v. Bullock, 474 U.S. 376 (1986), the Supreme Court determined that the requisite culpability finding should be made at some level in state court. The Court held that such a finding is entitled to a presumption of correctness in federal court, pursuant to 28 U.S.C.A. §2254(d).

This trilogy of cases directs the federal courts to handle an Enmund claim by reviewing the record of the entire course of State proceedings to determine if a culpability finding has been made at some point. Such a review in this case leads us to reject Smith's Enmund claim.

In making a written finding in support of the imposition of the death penalty, the trial judge made the following statement:

> Both the Defendant Smith, and Co-Defendant Copeland, have claimed that it was the other who was the major actor in the murder of Sheila Porter, but the evidence contradicts this. The evidence clearly shows that Smith and

> Copeland acted as equals and cohorts through the entire episode. They planned the robbery; together they carried out the robbery; together they kidnapped Sheila Porter; together they planned the rape and murder of Sheila Porter; together they raped her and murdered her. The evidence, including the testimony of Co-Defendant Victor Hall, ties these two defendants together in the murder of Sheila Porter.

Smith argues that this statement is not a legitimate finding on his culpability because the trial court relied on evidence gleaned from Johnny Copeland's trial, and by going outside the record in this manner, the trial court violated Smith's right to confrontation. We need not resolve the question of the adequacy of the trial court's finding because a review of the record indicates that the Florida Supreme Court also passed on the issue of Smith's culpability.

When Smith raised the Enmund issue on direct appeal, the Florida Supreme Court held that it was unnecessary to make the Enmund finding called for in felony murder cases because "here there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder." Smith v. State, 424 So.2d 726, 733 (Fla.), cert. denied, 462 U.S. 1145 (1983). Implicit in this finding is the conclusion that Smith had the intent to kill. Smith's culpability has been properly examined in state court and found to be

sufficient to justify imposition of the death penalty.

Smith has raised nothing to overcome the presumption of correctness to which this finding is entitled under 28 U.S.C.A. §2254(d). Indeed, there was sufficient evidence to support this finding. The evidence at trial revealed that before renting the motel room as well as during the time the co-defendants were actually assaulting Sheila Porter, Smith and Copeland discussed killing her. The two men were particularly worried about Porter testifying against them. It was Victor Hall's testimony that both Copeland and Smith wanted to kill Porter, and when they drove to Tram Road and parked, Smith got out, pulled Porter from the car, and, along with Copeland led her into the woods by the arm. Subsequently, Hall heard three shots some two seconds apart and then saw Smith emerge from the woods with the gun in his hand.

The dictates of Enmund have been satisfied in this case.

Pre-Trial Statements

Smith argues that certain of his post-arraignment statements were improperly admitted at trial because they were obtained in violation of his Sixth Amendment right to counsel. Smith's claim is premised upon Michigan v. Jackson, 475 U.S. 625 (1986), which held that a defendant cannot be interrogated by police after requesting

appointment of counsel at his arraignment, unless the defendant initiates the interview.

A panel of this Court recently held that Michigan v. Jackson applied retroactively in a case where the challenged statements were introduced before the jury during the sentencing phase of the trial. Fleming v. Kemp, 837 F.2d 940 (11th Cir. 1988). The question of the retroactivity of Michigan v. Jackson in cases where the statements were before the jury deciding guilt or innocence was reserved in Fleming and has not been decided by this Court. See Collins v. Kemp, 792 F.2d 987 (11th Cir. 1986) (staying execution to allow briefing on issue of retroactivity of Michigan v. Jackson). We need not decide the issue in this case because, even if Michigan v. Jackson does apply, Smith has not established a violation of his Sixth Amendment right to counsel.

The transcript of Smith's arraignment reveals that Smith in no way requested an attorney. Rather, after being informed of the charges against him and his Miranda rights, Smith stated that he did not have an attorney, "but I plan to get one." Thus, no attorney was appointed for Smith at his arraignment. The record indicates that Smith had consulted with an attorney prior to the arraignment, but Smith never officially retained this attorney or any other prior to the taking of his post-arraignment statements. Smith eventually submitted a motion for

appointment of counsel on December 28, 1978.

Assuming for the sake of argument that Smith manifested a request for counsel by his discussion with an attorney prior to his arraignment, Michigan v. Jackson is nevertheless inapplicable to this case. There the Supreme Court held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." (Emphasis added). Michigan v. Jackson, 475 U.S. at 636. The record of the suppression hearing held by the trial court affirmatively demonstrates that each of Smith's post-arraignment statements were initiated by him and not by the police.

Deputy Sheriff John Miller testified that while Smith was being transported to jail after his first appearance, Smith told Miller he should check K-Mart because that was where Johnny Copeland bought ammunition. Miller testified that he did not solicit that statement in any way. Miller said he also talked to Smith on December 16, the day after Smith's first appearance, and that Smith initiated a conversation and made other statements concerning the crime. Miller said he advised Smith of his Miranda rights prior to that conversation. Smith again requested to talk to Miller on December 17th. On December 18th, Smith signed a written

waiver and again gave police further information concerning the crime.

The Supreme Court of Florida has previously held that Smith's waiver of his right to counsel during his post-arrest interviews was free and voluntary. Smith v. State, 424 So.2d 726, 730 (Fla.), cert. denied, 462 U.S. 1145 (1983). Nothing in the record indicates otherwise.

In challenging the admissibility of statements taken before his arraignment, Smith states that an attorney contacted by Smith prior to his arrest twice tried to reach him during the course of his pre-arraignment interrogation, but was turned away by police. The United States Supreme Court has held that a defendant's knowledge of an attorney's attempts to reach him is irrelevant to a knowing and voluntary waiver of the right to counsel. Moran v. Burbine, 475 U.S. 412 (1986). But see Haliburton v. State, 514 So.2d 1088 (Fla. 1987) (failure to inform a defendant that an attorney was present and wished to see him violated the due process clause of the Florida Constitution). Smith's constitutional challenge to the admissibility of his pre-trial statements must fail.

Ineffective Assistance of Counsel at Penalty Phase

Smith contends that his trial counsel was constitutionally ineffective during the sentencing phase of his trial because counsel presented no evidence of

mitigating circumstances during the sentencing hearing and failed to request a jury instruction on Smith's withdrawal defense during the sentencing hearing. Smith also contends that he has never received a full and fair hearing on either prong of his ineffectiveness claim.

To prevail on his claim of ineffectiveness, Smith must establish that his counsel's performance at the sentencing hearing was seriously deficient and that he suffered prejudice as a result of this deficiency. Strickland v. Washington, 466 U.S. 668 (1984). The same standard for judging ineffective assistance claims applies to both guilt and sentencing phases of a capital trial. Funchess v. Wainwright, 772 F.2d 683, 688 (11th Cir. 1985), cert. denied, 475 U.S. 1031 (1986).

Smith alleges that the decision to forego presentation of such evidence was not tactical but rather was a function of counsel's failure to prepare for the hearing by investigating potential sources of mitigating evidence. Smith points to a myriad of circumstances which could have been presented to the jury: his mental history; his physical health, including the fact that he was an epileptic; his history of drug and alcohol abuse; his difficult family background and his incarceration in an adult prison at the age of fifteen. As further indicia of his counsel's ineffectiveness in not presenting mitigating evidence, Smith notes that his attorney has admitted that he felt

limited to statutory mitigating factors even though Smith was tried and sentenced after Lockett v. Ohio, 438 U.S. 586 (1978).

When a claim of ineffectiveness is based on an attorney's failure to present evidence of mitigating circumstances, this Court has rejected the argument that such a failure constitutes ineffective assistance per se. Recognizing that some so-called "mitigating" evidence can actually have a negative impact upon the jury, the Court has held that "the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence." Stanley v. Zant, 697 F.2d 955, 961 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984). Thus, while an attorney is required to conduct a "reasonable investigation" into possible mitigating evidence, Elledge v. Dugger, 823 F.2d 1439, 1455 (11th Cir.), withdrawn in part on reh'g, 833 F.2d 250 (11th Cir. 1987), counsel may limit presentation of such evidence in the exercise of his reasonable strategic judgment. Lightbourne v. Dugger, 829 F.2d 1012, 1025 (11th Cir. 1987). A tactical decision not to present mitigating evidence enjoys "a strong presumption of correctness which is virtually unchallengeable." Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). See also Davis v. Kemp, 829 F.2d 1522 (11th Cir. 1987).

Smith's trial attorney, Phillip J. Padovano, testified at length during the evidentiary hearing held in state court on Smith's ineffectiveness claim. Padovano's testimony demonstrates that he conducted an extensive investigation into Smith's background and made a strategic decision to forego presentation of the mitigating evidence he uncovered.

Padovano testified that in preparing for the case, he spent months interviewing hundreds of potential witnesses, including Smith's sister and Smith's grandmother, who was primarily responsible for raising Smith. Through these interviews, Padovano learned of Smith's troubled childhood, his history of epileptic seizures and his incarceration in an adult prison at the age of fifteen.

Padovano also obtained the services of a licensed psychologist to determine whether Smith had any mental problems which might constitute mitigating factors. Tests performed by this psychologist revealed that Smith had no cogenital or physiological defect, nor was he incompetent, insane or suffering from brain dysfunction.

Padovano explained his decision not to present mitigating evidence at sentencing hearing in the following manner:

> [Smith's] degree of participation and his degree of responsibility was both a defense to the case and

> a reason to mitigate the penalty. . . . I couldn't go into Court and argue for four days that this man tried to withdraw from the felony; that he didn't want to do it; that he tried to stop Johnny Copeland. And then when the jury found him guilty, go up to the jury and say: Well, he did it, but he was a little sick. You can't do that. You can't have any credibility doing that kind of thing.

The strategic decision made by Padovano in this case is precisely the sort of decision which should not be second-guessed by a court reviewing an ineffectiveness claim. Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986), cert. denied, 107 S.Ct. 3277 (1987). As to Smith's charge that Padovano misapprehended the law as it pertain to the presentation of non-statutory mitigating factors, it is clear that Padovano's investigation went far beyond statutory mitigating factors, indicating his awareness of Lockett v. Ohio, 438 U.S. 586 (1978). See Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). Padovano was not constitutionally ineffective in his handling of potential mitigating evidence during Smith's sentencing hearing.

As to the failure to request a jury instruction on Smith's defense of withdrawal at the sentencing phase, Padovano did make the argument at sentencing that Smith was not as culpable as Copeland and therefore the

death penalty was too severe a punishment. The jury instructions included the statutory mitigating circumstance that the defendant's participation in the murder was minor compared to that of his co-perpetrator. In light of these facts, Padovano's failure to seek an instruction on withdrawal was not deficient performance.

Smith contends that he is entitled to a second evidentiary hearing on his ineffectiveness claim because, due to time constraints, he did not have an opportunity to adequately investigate and present his claim in state court. This allegation is based on the fact that the evidentiary hearing held in state court was scheduled within a week of Smith's obtaining counsel for the collateral proceedings. Smith has not demonstrated, however, what evidence he would present at such a hearing beyond the affidavits he filed in state court. The transcript of the hearing indicates that Padovano was extensively examined by Smith. The hearing in state court was full, fair and adequate; Smith is therefore not entitled to evidentiary hearing in federal court.

Sentencing Proceedings

Smith contends that his sentencing hearing was unreliable and fundamentally flawed because: (1) the trial court limited consideration of non-statutory mitigating factors; (2) the trial court instructed the jury that its decision to recommend life or death had to be by

majority vote; (3) the trial court's instruction on the weighing of statutory and mitigating factors shifted the burden of persuasion to Smith; (4) irrelevant considerations were interjected into the sentencing decision by the charge given on lesser-included offenses; and (5) the jury was instructed on all statutory aggravating factors regardless of whether they were relevant to this case.

Smith raised these claims for the first time in his motion pursuant to Rule 3.850. The Florida Supreme Court refused to address the merits of these arguments because they "could have been presented on appeal" and were not. Smith v. State, 457 So.2d 1380, 1381 (Fla. 1984). Smith has not shown sufficient cause or prejudice to excuse his failure to raise these claims on direct appeal. Procedural default thus bars consideration of these issues.

On appeal, Smith does not deny procedural default. Rather, he contends that Florida so arbitrarily and inconsistently enforces its rule against collateral consideration of matters not raised on direct appeal that the rule is not an adequate procedural bar under Wainwright v. Sykes, 433 U.S. 72 (1977). This precise contention has been expressly rejected by this Court in Booker v. Wainwright, 764 F.2d 1371, 1379 (11th Cir.), cert. denied, 474 U.S. 975 (1985) and Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984), cert. denied, 471 U.S. 1107 (1985). In these cases, this Court found the Supreme

Court of Florida is consistent in its application of the contemporaneous objection and procedural default rules in capital cases.

Race as a Factor in Sentencing

Smith claims that race was used as a factor in the decision to sentence him to death. Proffering several general statistical studies, including that done by Gross and Mauro, Smith contends that he is entitled to an evidentiary hearing on this issue.

No evidentiary hearing is required in this case. Even assuming the validity of the statistical studies relied on by Smith, they are insufficient to demonstrate unconstitutional discrimination under the Fourteenth Amendment, or to show irrationality, arbitrariness or capriciousness under the Eighth Amendment. See McCleskey v. Kemp, 107 S.Ct. 1756 (1987).

AFFIRMED.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FRANK SMITH,

Petitioner,

v. TCA 84-7355-WS

LOUIE L. WAINWRIGHT, ORDER

Respondent.

This cause comes before this court on Frank Smith's petition for a writ of habeas corpus. Respondent Wainwright has moved for summary judgment on the habeas claims.

FACTS

The record shows that on the evening of December 12, 1978, petitioner and two accomplices robbed a convenience store in Wakulla County, Florida. They then abducted the store clerk, Sheila Porter, and took her to a motel in Leon County, Florida. There all three men committed sexual battery upon her. Petitioner's accomplice, Victor Hall, testified that the three men later drove Sheila Porter to a wooded area. There, Hall waited in the car while the petitioner and Johnny Copeland took her into the woods. Three gunshots were heard. When Copeland and Smith returned to the car, Smith was carrying a gun.

They returned without Sheila Porter. Two days later, her body was found with three bullet wounds in the back of her head.

Petitioner was eventually indicted by a grand jury in Franklin County, Florida. The indictment charged Smith with premeditated murder, robbery, kidnapping, and sexual battery. A jury returned a verdict of guilty on all charges, and recommended imposition of the death penalty. The trial judge sentenced Smith to death in accordance with that recommendation.

Petitioner's conviction and sentence were affirmed on direct appeal to the Florida Supreme Court. Smith v. State, 424 So.2d 726 (1983), cert. denied, ___ U.S. ___, 103 S.Ct. 3179, 77 L.Ed.2d 1379 (1983).

On September 19, 1984, the governor of Florida signed a death warrant, and petitioner's execution was scheduled for October 16, 1984, at 7:00 a.m. Petitioner sought a stay of execution and other relief pursuant to Rule 3.850, Fla.R.Crim.P. This relief was denied by Florida's Second Judicial Circuit. Petitioner next sought relief from the Supreme Court of Florida, where he filed an appeal from the denial of his Rule 3.850 motion and petition for habeas corpus. This relief was also denied. Smith v. State, No. 65,991, slip op. (Fla. October 11, 1984).

Having exhausted all of his state remedies, petitioner seeks relief from this court. A motion for stay of execution and a petition for writ of habeas corpus was filed on October 13, 1984. Respondent has moved for summary judgment on the petitioner's habeas claims. A hearing was held on October 15, 1984. At the conclusion of the hearing this court granted a stay of execution in order to take time to review the voluminous record and to allow the petitioner time to respond to the motion for summary judgment.

After review of the record, the court notified the parties that it would consider supplemental briefs on two issues: whether the trial court's refusal to instruct the jury on the withdrawal issue was error; and, if so, whether it was an error of constitutional magnitude such that it would require federal habeas corpus relief. Oral argument on those issues was held on February 8, 1985.

Petitioner has raised a total of eighteen claims in his application for habeas relief. However, then of those claims are not cognizable at this proceeding because of petitioner's procedural default on those issues. This court has reached a conclusion on the merits of the eight remaining claims asserted by the petitioner. Those claims are discussed individually below.

ISSUES NOT COGNIZABLE BECAUSE OF PROCEDURAL DEFAULT

The following issues which petitioner asserts as grounds for habeas relief were not raised as required at his trial or in subsequent proceedings in the state courts: (1) that jurors were improperly excused for cause due to their objections to the death penalty; (2) that even if excusing jurors because of their objections to the death penalty was proper, excusal in this case deprived the petitioner of a jury drawn from a representative cross section of the community; (3) that at trial, the state was improperly permitted to bolster the credibility of its witness in violation of the petitioner's right of confrontation; (4) that the Florida procedure which allows a jury charge on all lesser offenses was a violation of due process because it invites inevitably arbitrary results; (5) that it was error to instruct the jury on all the statutory aggravating circumstances regardless of whether there was support for them because it created the danger that the jury's advisory verdict was based on improper aggravating circumstances or that the jury applied the circumstances in an overbroad manner; (6) that the trial court improperly precluded consideration of non-statutory mitigating circumstances; (7) that the burden of proof was unconstitutionally shifted to petitioner during the penalty phase; (8) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be

made by a majority vote; and (9) that the Florida Supreme Court improperly reviewed ex parte information about defendants in capital cases.

It is well settled that a federal habeas court cannot consider, on the merits, a claim which would be barred by the state courts because of a procedural default unless the petitioner can show cause for the default and actual prejudice resulting from it. Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). Pursuant to Rule 3.850, Fla.R.Crim.P., the issues listed above were not considered by the Florida courts because they could have been but were not presented on direct appeal. Under Rule 3.850, the Florida court has barred further collateral attacks because a procedural default occurred either at trial or on direct appeal. Because collateral attack is barred by the state court, petitioner must show cause and prejudice before these claims will be cognizable on federal habeas corpus review.

Petitioner's only alleged cause for the default is contained in an affidavit submitted by Philip Padovano, the attorney who represented Smith at trial and on direct appeal (document 20). In his affidavit, attorney Padovano discusses several of the claims that petitioner raises at this proceeding. With regard to his failure to object at trial or raise the issues on appeal, Padovano states: "If these failures were error on my part, they were not due to a tactical choice. Rather, they were

due to unawareness, inadvertence, and oversight . . ." Based upon that affidavit, petitioner claims that cause for default has been demonstrated. This assertion is without merit because despite the fact that petitioner has carefully avoided expressing his claim in this way, the substance of his argument can only be that the cause of the default was ineffective assistance of counsel. This argument must fail because it is well settled that a claim of ineffective assistance of counsel will not provide "cause" to avoid procedural default. Washington v. Estelle, 648 F.2d 276, 278 (5th Cir. 1981).

Petitioner has not alleged any other cause for his default. Without such a showing, there is no need for the court to decide whether actual prejudice resulted from the default because under the Sykes-Engle doctrine both cause and prejudice must be shown in order to avoid procedural default. Because no cause for the default has been shown, petitioner is barred from asserting these claims.

A final issue which must be disposed of based upon the petitioner's procedural default is whether the trial court's refusal to instruct on the withdrawal defense was a violation of due process. This issue is discussed separately because the nature of the petitioner's default on this issue is different than that of the other issue precluded.

During Smith's trial, evidence was admitted about pre-trial statements made to police by the petitioner. Testifying about the content of those statements, prosecution witnesses admitted that petitioner had consistently maintained that he did not intend to kill Sheila Porter, and that he tried to dissuade his alleged co-conspirators from killing her. (Record at 2266-68, 2273, 2318-19). Based upon this evidence, petitioner requested a jury instruction on the issue of withdrawal. The trial court refused to grant such an instruction. On direct appeal, petitioner argued that the refusal was reversible error. However, petitioner's argument on this issue was based on state law. He did not assert a violation of his constitutional right to due process based upon the refusal to instruct, and did not otherwise frame his argument in federal constitutional terms. Consequently, the Florida Supreme Court analyzed the claim in terms of Florida law and found that the evidence was "hardly sufficient to raise the issue of withdrawal" and that if there was any error it was harmless. Smith v. State, 424 So.2d 726, 732 (Fla. 1983). Petitioner did not raise the federal constitutional nature of his claim until his Rule 3.850 motion was filed in October 1984. In the Rule 3.850 proceedings, the Florida courts held that the claim was barred because petitioner had defaulted on that issue by not raising the constitutional claim on direct appeal. Pursuant to the Sykes-Engle doctrine, the claim is also barred at this habeas corpus proceeding

because petitioner has defaulted on the issue at the state court. In Engle v. Isaac, 456 U.S. 107 (1982), under similar circumstances, the Supreme Court reaffirmed "that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." Id. at 124. Because petitioner has not demonstrated cause or prejudice, the withdrawal claim is also not cognizable at this proceeding.

ADMISSION OF PRE-TRIAL STATEMENTS

Among those claims which are not barred because of procedural default is petitioner's assertion that his constitutional rights were violated when his pre-trial statements were admitted at trial. Smith claims that the statements should have been suppressed for the following reasons: First, because the statements were neither voluntary nor the product of a knowing and voluntary waiver of fifth amendment rights; Second, because the statements were not the product of an intentional abandonment or relinquishment of the sixth amendment right to counsel; Third, because the trial court erred in considering the content of the statements when deciding the issue of voluntariness.

Petitioner correctly asserts that Miranda and its progeny preclude the use of statements made without a voluntary abandonment of the right to counsel. Miranda v. Arizona, 384 U.S. 436 (1966);

Edwards v. Arizona, 451 U.S. 477 (1981); Massiah v. United States, 377 U.S. 201 (1964). However, this argument does not provide any relief for the petitioner, because in this case there is simply no evidence in the record to support a conclusion that the statements were not voluntary. On the contrary, the record clearly reflects the fact that the petitioner voluntarily accompanied the police officers to the place where questioning occurred, was frequently apprised of his Miranda rights, and voluntarily made statements to investigators without any request for assistance of counsel. (R. 2214, 2222, 2229, 2237, 2240).

Petitioner's argument that the trial court improperly considered the content of the statements when determining their admissibility is also without merit. Rogers v. Richmond, 365 U.S. 534 (1961), has held that it is not proper for a court to appraise the legal significance of facts when making a determination about whether to allow a statement into evidence. But petitioner adduced no evidence that the court did improperly consider such facts. The only possible support for this allegation is the fact that the content of the statements was adduced at the suppression hearing. However, Rogers does not preclude permitting that into evidence. On the contrary, if such a proffer were not permitted, the trial court would be unable to provide important information for the record on appeal. Accordingly, petitioner's claims on this issue are without merit.

ENMOND ISSUE

Petitioner also claims that the trial court erred by failing to instruct the jury that it had to specifically find that Smith actually killed or intended to kill before the death penalty could be imposed. Petitioner bases this assertion on Enmond v. Florida, 458 U.S. 782 (1982), which held that the eighth amendment prohibits the imposition of the death penalty on a defendant who did not kill or intend the killing to take place. The Enmond court held that the record in that case only supported an inference that Enmond was the person in a car parked by the side of a road near a farmhouse where co-defendants committed robbery and murder. This evidence was not enough to support a "finding that Enmond had any intention of participation in or facilitating a murder." Id. at 798.

The Supreme Court's focus was on Enmond's individual culpability:

> the focus must be his culpability, not on that of those who committed the robbery and shot the victim; for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," . . . which means that we must focus on "relevant facets of the character and record of an individual offender."

Id. (citations omitted).

The Eleventh Circuit has interpreted Enmond as requiring an examination of the individual culpability of the defendant to determine whether there is sufficient evidence to support a finding of intent. Stephens v. Kemp, 721 F.2d 1300, 1303 (11th Cir. 1983); Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983). In Ross, the court found that there was sufficient evidence to show that the individual culpability of Ross was greater than that of Enmond. The court also found that the evidence was sufficient to support a conclusion that Ross did contemplate that life would be taken, as required by Enmond, Id. at 1533. Similarly, in this case, the individual culpability of petitioner Smith is significantly greater than that of Enmond. Here petitioner admits taking part in the robbery and kidnapping of Sheila Porter. At a minimum he accompanied Johnny Copeland into the woods where Porter was killed. When they returned from the woods, it was the petitioner who carried the gun that killed her. Under similar circumstances, the Eleventh Circuit has held that Enmond is not applicable:

> Petitioner's admission that he participated in the robbery, kidnapping, and murder, notwithstanding his assertion that an accomplice actually pulled the trigger, renders Enmond inapplicable.

Stephens v. Kemp, 721 F.2d 1300, 1303 (1983).

Finally, petitioner urges that before the death penalty can be imposed, Enmond requires a jury instruction which would require a specific finding of intent to kill. In Redix v. Thigpen, 728 F.2d 705 (1984), the Fifth Circuit has implied that such an instruction is required by Enmond. However, this claim was rejected by the Eleventh Circuit in Stephens, 721 F.2d at 1303. Therefore, petitioner's Enmond claim is without merit.

APPLICATION OF AGGRAVATING CIRCUMSTANCES

Petitioner next claims his due process rights were violated because the trial court's application of four aggravating circumstances was so overbroad that there is a grave risk that the sentence imposed on petitioner is the product of arbitrary and capricious factors, in violation of Godfrey v. Georgia, 446 U.S. 420 (1980). Specifically, petitioner claims that: (1) there was no basis for the trial court's finding that the murder of Sheila Porter was committed with intent to avoid arrest; (2) there was no basis to show that the murder was committed for pecuniary gain; (3) the murder was not heinous, atrocious, or cruel; and, (4) there was no evidence of cold, calculated premeditation.

All of these claims were previously argued before on direct appeal, where the Florida Supreme Court concluded that there was a sufficient basis in the record to support the application of those aggravating circumstances. Smith

v. State, 424 So.2d at 732-33. That finding of fact should be presumed correct, pursuant to 28 U.S.C. §2254(d)(8) (1982), which provides that a federal court ruling on a habeas corpus petition should not overturn a factual conclusion of a state court unless the conclusion is not fairly supported by the record.

Even if the Florida court's findings are considered conclusions of law, they must be accepted because application of aggravating circumstances is a matter of state law. Florida courts have final authority to interpret that state's legislation. Brown v. Ohio, 432 U.S. 161, 169 (1977); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

In Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983), the Supreme Court was faced with an analogous claim. Barclay asserted on direct appeal that the Florida court had improperly relied on a non-statutory aggravating circumstance in imposing his death penalty. In denying Barclay relief, the court allowed the Florida Supreme Court findings to stand and said that the real issue in a habeas petition was "whether the trial judge's consideration of the improper aggravating circumstances so infects the balancing process created by the Florida statute that it is constitutionally impermissible for the Florida Supreme Court to let the sentence stand." Id. at 77 L.Ed.2d 1148.

In Barclay and in Wainwright v. Goode, ___ U.S. ___, 104 S.Ct. ___, 78 L.Ed.2d 187 (1983), the Supreme Court found that the balancing process was not so infected as to be constitutionally impermissible, despite allegations of improper consideration of non-statutory aggravating circumstances. In this case, petitioner's claims are even less compelling because there is no allegation that the trial court improperly considered non-statutory aggravating circumstances. There was nothing considered by the trial court that would so infect the balancing process so as to render it constitutionally impermissible. Consequently, petitioner's claim on the issue is without merit.

RACE DISCRIMINATION CLAIMS

Petitioner next claims that the death penalty in Florida is administered in a racially discriminatory manner. He raises two issues based upon that claim. First, petitioner asserts that the discriminatory administration is a violation of the eighth and fourteenth amendments. Second, he urges that his fourteenth amendment due process rights were further violated by the state courts refusal to allow a hearing on the race discrimination issue.

In support of his discrimination claim, petitioner relies on a variation of the studies by Professors Gross and Mauro. These studies present statistical data that purports to show (1) that an offender guilty of killing a white victim is more likely to receive

the death penalty than one who is convicted of killing a black victim; and (2) that a black offender is more likely to receive a death sentence than a white offender. However, any claim based upon these studies must be found to be without merit because the Fifth and Eleventh Circuits and the Supreme Court have repeatedly found the Gross-Mauro studies to be insufficient and unreliable. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). Moreover, similar race discrimination claims have repeatedly been rejected by the Supreme Court in other death penalty cases. Ford v. Strickland, ___ U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d ___ (1984), vacated without opinion, ___ U.S. ___, 104 S.Ct. 2183, 80 L.Ed.2d 809 (1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), stay denied, ___ U.S. ___, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983).

Petitioner urges that his claim does have merit because it is based upon specific data about Florida's Second Judicial Circuit, rather than the statewide statistics that were rejected in the aforementioned cases. However, in Henry v. Wainwright, No. 84-3647, slip op. (11th Cir., September 19, 1984) this circuit rejected a similar assertion that was based on a particularized claim of discrimination. In rejecting that claim, the Eleventh Circuit noted that petitioner's claim,

though particularized, was still based upon the same statistical study that was rejected in previous cases.

Similarly, the petitioner's assertions in this case are based on studies which have been repeatedly rejected. Accordingly, his race discrimination claims are found to be without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next raises two claims of ineffective assistance of counsel. Smith claims that his counsel was ineffective during sentencing and on direct appeal.

The Supreme Court has recently held that the standard for judging a claim of ineffectiveness of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674, 692-93. In order for a court to make such a determination, and thus require reversal, a two-part test must be satisfied: "First, the defendant must show that the counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 80 L.Ed.2d 693.

The deficiencies alleged by the petitioner in this case are that counsel (1) failed to adequately prepare during

the sentencing phase; (2) failed to request jury instructions during the sentencing phase; (3) failed to investigate potential sources of exculpatory information; and (4) failed to prepare and present mitigating evidence. While some of those actions might be considered questionable, they cannot be said to be outside of the wide range of conduct considered reasonable professional assistance. Strickland held that the reasonableness of an attorney's conduct must be judged by the totality of the circumstances, and that there is a "strong presumption" to be given that an attorney's conduct is reasonable. Id. at 80 L.Ed.2d 698-99. Petitioner has not overcome that strong presumption in this case.

Moreover, the Florida courts held a hearing on the issue and determined it to be without merit. While such findings are not binding on federal habeas review, they are entitled to great deference from this court. Id. at 80 L.Ed.2d 700. Accordingly, petitioner's assertions of ineffective assistance are found to be without merit.

NOTICE OF SUPERSEDING INDICTMENT

Petitioner was originally indicted on a charge of felony murder. However, when his first trial ended in a mistrial, a superseding indictment was issued that charged him with premeditated murder. The superseding indictment was issued 24 days before petitioner's second trial. (R. 422).

Petitioner argues here that 24 days was inadequate notice which constituted a violation of his sixth and fourteenth amendment rights.

This issue was raised on direct appeal to the Florida Supreme Court. The Florida court found that the second indictment was neither untimely nor prejudicial. Instead, the court stated:

> This amount of preparation time was not insufficient considering the fact that the question of premeditation was already at issue in connection with the issue of intent to withdraw and intent to murder to avoid apprehension and prosecution.

Smith v. State, 424 So.2d at 729.

State finding of facts are entitled to considerable deference from this court on habeas review. In Summer v. Mata, 449 U.S. 539 (1981), the Supreme Court explained the standard of review in such cases:

> [T]he findings made by the state-court system "shall be presumed to be correct" unless one of seven conditions specifically set forth in 28 U.S.C. §2254(d) was found to exist by the federal habeas court. If none of those seven conditions were found to exist, or unless the habeas court concludes that the relevant state-court determination is not "fairly supported by the record," "the burden shall rest

> upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Id. at 550 (emphasis in original).

The finding of the Florida court is fairly supported by the record. In addition to the reasons given by the Florida court, this court notes that petitioner cannot seriously claim prejudice given the fact that he had already been fully prepared for trial before the second indictment was issued. In fact, a trial had already begun; the second indictment was only issued when the first trial ended in a mistrial. Even if it could be argued that premeditation was a new issue, it was the only issue that was different in the second trial. Twenty-four days is not an unreasonable time to allow for preparation on one issue.

Petitioner has failed to prove by convincing evidence, as required by 28 U.S.C. §2254(d) (1982), that the Florida Court's finding was clearly erroneous. Accordingly, his claim of prejudice as a result of the second indictment is without merit.

CONCLUSION

In conclusion, this court has determined that all the issues that are raised by the petitioner have either been barred by the petitioner's procedural default or are without merit.

Accordingly, it is ORDERED and ADJUDGED:

1. The petition for writ of habeas corpus is DENIED.

2. The stay of execution previously granted by this court will remain in effect for thirty (30) days in order to give the parties an opportunity to file a notice of appeal.

DONE and ORDERED this 23rd day of March, 1985.

William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

[1] This conclusion seems to go against the great weight of Florida case law which has held that any evidence of withdrawal is enough to warrant an instruction. Laythe v. State, 330 So.2d 113 (Fla. 3d DCA), cert. denied, 339 So.2d 1172 (Fla. 1976); Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945). In fact, in the Smith opinion, the Florida court states, "If there is any evidence of withdrawal, an instruction should be given." Smith, 424 So.2d at 732 (emphasis added). Although on direct appeal, petitioner urged that the refusal to instruct was reversible error, he does not base his claim on that argument at this proceeding. Nor would he be successful if he did because the Florida Supreme Court's views with respect to state law are binding on this court. Thus, despite overwhelming authority to the contrary, the Florida court has the power to conclude that denial of the instruction was harmless in this case.

FOOTNOTE: Smith v. Wainwright, TCA 84-7355-WS,
Order of March 23, 1985

SUPREME COURT OF FLORIDA

Nos. 65,991 & 65,992

FRANK SMITH, Appellant,

vs.

STATE OF FLORIDA, Appellee.

FRANK SMITH, Petitioner,

vs.

LOUIE L. WAINWRIGHT, ETC., Respondent.

[October 11, 1984]

BOYD, C.J.

These consolidated cases are before the Court on (1) appeal from the denial of a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850 and (2) a petition for writ of habeas corpus. Appellant-Petitioner has also filed a motion for stay of execution of sentence. We affirmed the denial of the motion for post-conviction relief and deny the petition for habeas corpus. Having resolved all issues

adversely to appellant-petitioner, we deny his motion for stay of execution.

Frank Smith is a state prisoner under sentence of death. By jury trial he was convicted of first-degree murder, robbery, kidnapping, and sexual battery. In accordance with the recommendation of the jury, Smith was sentenced to death on the first-degree murder conviction. He was entitled to and received appellate review of his convictions and sentence of death. This Court affirmed the convictions and the sentence of death. Smith v. State, 424 So.2d 726 (Fla. 1982). Smith's subsequent petition for review was denied by the United States Supreme Court. Smith v. Florida, 103 S.Ct. 3129 (1983).

Appeal of Denial of
Rule 3.850 Motion

Appellant's motion to vacate, set aside or correct judgment and sentence raised the following issues: (1) that jurors were improperly excused for cause due to their opposition to capital punishment and that, even if they were properly excused, imposing such "death qualifications" deprived appellant of trial by a jury drawn from a representative cross-section of the community; (2) that the jury instruction given on the process of weighing aggravating and mitigating circumstances placed the burden on the defendant to prove that death was not the appropriate penalty; (3) that the state at trial was improperly allowed to bolster the credibility of its principal witness

before the defense had attempted to impeach him, violating the defendant's right of confrontation; (4) that the trial court erred in refusing to instruct the jury on the defense of withdrawal; (5) that the giving of jury instructions on all lesser degrees of homicide, attempted murder, and felony murder is a practice conducive to arbitrariness in violation of the Eighth Amendment; (6) that instructing the jury on all the statutory aggravating circumstances was improper; (7) that the trial court erroneously instructed the jury that its decision to recommend either life or death would have to be made by a majority vote; (8) that the trial court so instructed the jury on mitigating circumstances as to limit consideration to statutory mitigating circumstances and that the court limited its own consideration thus as well; (9) that appellant did not receive the effective assistance of counsel at trial; and (10) that appellant's sentence of death was a product of systematic racial discrimination in capital sentencing.

All but the last two of these arguments are issues that either were or could have been presented on appeal and are therefore not proper grounds for collateral challenge of the convictions or sentence. See Booker v. State, 441 So.2d 148 (Fla. 1983). Appellant argues that these grounds are cognizable even though not raised on appeal, or even though raised on appeal and decided adversely to appellant, because they constitute fundamental error. We reject

this contention and find that issues (1) through (8) above were properly summarily denied by the trial court as improper grounds for a Rule 3.850 claim.

The claim that the death sentence was the product of racially discriminatory sentencing practices is in theory one that can be raised by motion under Rule 3.850. See Henry v. State, 377 So.2d 692 (Fla. 1979). However, we find that appellant did not make a sufficient showing to require the trial court to hold a hearing on the claim and we therefore affirm the trial court's summary denial of relief on this ground. See State v. Washington, 453 So.2d 389 (Fla. 1984).

The trial court properly held an evidentiary hearing on appellant's claim that the performance of his trial defense counsel was deficient. Under Strickland v. Washington, 104 S.Ct. 2052 (1984), a convicted person making such a claim must identify specific acts or omissions that were deficient in the sense that they "were outside the wide range of professionally competent assistance." Id. at 2066. The inquiry must be based on a presumption of competence and a deferential approach to counsel's strategy and tactics. The claimant who meets this requirement must then establish that the deficiency was such that there is a reasonable probability that the result of the proceeding would have been different. The United States Supreme Court explained that this second element of the necessary showing--prejudice--was

shown by a failure of the adversarial testing process sufficient to undermine confidence in the outcome.

The trial court found that appellant had failed to show any deficiency or deviation from professional standards of competence on the part of defense counsel at appellant's trial. We agree and approve the trial court's analysis of the facts as follows:

> The defendant was represented at trial and on direct appeal by Mr. Philip J. Padovano. Mr. Padovano represented the defendant for six (6) years from December, 1978, through the summer of 1984 until this claim was lodged against him. He represented the defendant during all phases of discovery, pre-trial hearings, the guilt phase of the trial, the penalty phase, and the direct appeal to the Florida Supreme Court.
>
> Mr. Padovano is an experienced criminal trial lawyer with over one hundred (100) jury trials to his credit. As of the time of the defendant's trial in this case, Mr. Padovano had been involved in more than fifty jury trials. Moreover, he secured the assistance in this case of another experienced trial attorney, Mr. Martin Murray, of St. Petersburg, Florida, who had previously represented defendants in capital

cases. Furthermore, Mr. Padovano has been a member of the Florida Bar for eleven (11) years and has had no grievances or claims of ineffectiveness filed against him previously.

Mr. Padovano was able to effectively communicate with the defendant through every stage of the proceedings. In fact, the defendant wrote often to Mr. Padovano and never expressed the notion that he was less than pleased with Mr. Padovano's representation. The only complaint the defendant expressed was the speed at which Mr. Padovano responded to his letters. However, this was during a two year period awaiting the Florida Supreme Court's opinion on direct appeal.

In preparing for trial Mr. Padovano spoke with hundreds of potential witnesses including members of the defendant's family. They included the defendant's sister, Jessie Smith-Givens, and his grandmother, Caldonia Smith. After interviewing these two individuals Mr. Padovano determined their testimony would not be helpful during the penalty phase of the proceedings and made the strategic choice not to call them as witnesses in defendant's behalf. He determined Jessie Smith-Givens was in a branch of the armed services and would be

going to Germany thus unavailable to testify. However, he made it clear her distance from the proceeding was not the reason he chose to call her to testify. In addition, he determined Caldonia Smith's testimony at the penalty phase would not be helpful. She had told him she did noto think she would live through the experience as her health was very poor and that she did not want to testify in any event.

Mr. Padovano's pre-trial discovery included the deposition of co-defendant, Victor Hall, who had testified during the trial in the guilt phase that the defendant was the one carrying the "smoking gun" when Johnny Copeland (the other co-defendant) and Smith returned to the car from the woods in which Sheila Porter was murdered. On cross-examination, Mr. Padovano was able to impeach Hall by getting him to admit he had "lied" to the jury on direct examination. Afterward, Hall broke down and cried on the witness stand. Due to Hall's total impeachment in front of the jury, Mr. Padovano did not even "elevate to a decision" whether to call Hall as a witness in the penalty phase. While Mr. Padovano did not have an opportunity to scrutinize every detail of Hall's affidavit which the defendant attached to his motion for post-conviction relief, he was able to

determine the affidavit is inconsistent with Hall's trial testimony. This fact is supported by the record.

In an effort to bring mitigating factors to the attention of the jury, Mr. Padovano obtained the services of Dr. Wallace Kennedy, a licensed psychologist and professor of psychology at Florida State University. Dr. Kennedy examined the defendant pursuant to this Court's order. He reported to Mr. Padovano that the defendant had no congenital or physiological defects. Moreover, he advised that the defendant was not incompetent or insane and did not suffer from any type of brain dysfunction. Dr. Kennedy advised Mr. Padovano the defendant was a secondary psychopath, a mental disorder acquired after birth but which does not rise to the level of incompetency or insanity. Dr. Kennedy advised further that his prognosis of Smith's future behavior was very poor. He indicated his testimony would be harmful rather than helpful and, in fact, it was his opinion Smith would kill again. Based on this information, Mr. Padovano reminded Dr. Kennedy of the attorney-client privilege and made the strategic choice not to call him as a defense witness at the penalty phase.

Mr. Padovano later learned from a subsequent conversation with Dr. Kennedy that the defendant suffered from epilepsy as a child. However, in contacting the office of Smith's physician, Dr. Brickler, Mr. Padovano was unable to verify whether or not Smith was ever a patient of Dr. Brickler.

Mr. Padovano did not have separate strategies for the guilt phase of the trial and the penalty phase. Based on the statements given the police by Smith and his co-defendants, especially Victor Hall who put the gun in Smith's hand, as well as the other State's evidence, a trial strategy was developed long before trial that the State would be held to its burden of proof. Furthermore, the defense strategy was to show that although Smith was involved in the underlying felonies he was not the murderer but rather tried to withdraw and talk Johnny Copeland out of killing Sheila Porter when he learned lethal force was about to be used against her. Thus, he argued Smith was not deserving of the death penalty. Mr. Padovano felt confident the jury was accepting his argument during the guilt phase that Smith was not the triggerman and that Hall could not be believed when the jury returned and asked what the highest offense Smith could be convicted of if he did not pull the trigger. While the question had a positive impact

on Mr. Padovano, he testified it would not have changed his approach and served only to reinforce the defense strategy.

Based on the foregoing, the entire testimony before this Court in defendant's Rule 3.850 motion hearing and on the record of this case, I find the defendant's trial counsel, Mr. Philip J. Padovano, did not call character witnesses to testify in mitigation at the penalty phase for the reason their testimony would have been harmful rather than helpful. Such harmful testimony would have supported aggravating circumstances rather than mitigating ones. I find based upon the testimony that Mr. Padovano elected not to present the evidence in question and it was a considered strategic judgment.

We find that the appellant failed to establish the first element of the Strickland v. Washington test for ineffective assistance of counsel and therefore affirm the trial court's denial of post-conviction relief.

Petition for Habeas Corpus

Smith's habeas corpus petition raises the issue of denial of effective assistance of counsel on appeal. By means of this challenge to appellate counsel's performance, petitioner seeks to have this Court to provide belated review of issues which were not argued

on appeal but which petitioner says should have been argued and would have resulted in favorable appellate relief if they had been argued.

Again, under Strickland v. Washington, petitioner must first show that his counsel's performance fell short of prevailing professional norms, then must show a reasonable likelihood that the deficiency affected the outcome. Bearing in mind the presumption of competence and the required deference to counsel's strategic choices, as taught by Strickland v. Washington, we find that petitioner has not identified any act or omission of her former appellate counsel that constituted a deficiency or deviation from professional norms. We therefore decline to allow petitioner to use the ineffectiveness challenge as a vehicle for further appellate review of his convictions and sentence.

The judgment of the circuit court is affirmed and the petition for writ of habeas corpus is denied. The motion for stay of execution is denied.

It is so ordered.

ADKINS, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., Concur
SHAW, J., Concurs in result only

NO MOTION FOR REHEARING WILL BE ALLOWED

An Appeal from the Circuit Court in and for Wakulla County,

Kenneth L. Cooksey, Judge - Case No. 78-66

And An Original Proceeding - Habeas Corpus

Baya Harrison, III, Tallahassee, Florida; Billy H. Nolas of Plunkett, Nolas and Donnard, New York, New York; and Santha Sonenberg, Public Defender Service for the District of Columbia, Washington, D.C.,

for Appellant/Petitioner

Jim Smith, Attorney General; Lawrence A. Kaden and Thomas H. Bateman, III, Assistant Attorneys General; and Bob Cummings, Assistant State Attorney, Tallahassee, Florida,

for Appellee/Respondent